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No. 03-___

IN THE

Supreme Court of the United States

QWEST CORPORATION,

Petitioner,

v.

METRONET SERVICES CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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107 pp

QUESTION PRESENTED

Whether an incumbent local exchange carrier subject to pervasive regulation under the Telecommunications Act of 1996 may be held liable under the antitrust laws for "exclusionary conduct" or for denial of access to "essential facilities" because it amended the terms of certain volume discounts to avoid losing both short term and long term revenue.

RULE 29.6 STATEMENT

Petitioner Qwest Corporation, formerly U S WEST Communications, is a wholly owned subsidiary of Qwest Communications International, Inc. ("QCII"), which is publicly traded. No publicly held company owns 10% or more of QCII's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Qwest Corporation petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The court of appeals' amended opinion (Pet. App. 1a-45a) is reported at 329 F.3d 986. The original opinion was reported at 325 F.3d 1086 (now withdrawn). The opinion of the district court (Pet. App. 47a-61a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2003. The court amended its opinion and denied rehearing en banc on May 21, 2003. Pet. App. 1a-3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, and provisions of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, are reprinted at Pet. App. 63a-82a.

STATEMENT

Violating central precepts of modern antitrust law, the Ninth Circuit held in this case that a firm risks treble damages under the Sherman Act for failing to help its rivals siphon off its profits, even though pervasive industry regulation already gives the rivals many opportunities to use the firm's own facilities and service offerings to compete against it. The Ninth Circuit's decision is wrong and importantly so, because it creates enormous uncertainty about the circumstances in which a firm will subject itself to ruinous antitrust liability by following its own objectively reasonable business judgment while adhering to every applicable regulation designed to ensure fair competition. And, more specifically, the decision perversely discourages firms from ever offering discounts to volume purchasers, because it threatens them with treble damage liability if they later fine-tune those discounts to take account of evolving market conditions. In that respect, the Ninth Circuit has turned the principal objectives of antitrust law—economic efficiency and consumer welfare—directly on their heads.

This petition presents many of the same issues—concerning the "essential facilities" doctrine, the standards for "exclusionary conduct," and the complex relationship between the Sherman Act and the Telecommunications Act of 1996—now pending before this Court in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, *cert. granted*, No. 02-682 (Mar. 10, 2003). The Court should therefore hold this petition pending its disposition of *Trinko* on the merits. If, as the Solicitor General urges on behalf of the federal antitrust authorities, the Court reverses the Second

Circuit in *Trinko*, the Court should grant this petition, vacate the decision below, and remand to the Ninth Circuit for further proceedings. In the unlikely event the Court does not reverse the Second Circuit in *Trinko*, it should grant this petition outright and decide this case on the merits.

A. Statutory Background

Petitioner Qwest, the successor to U S WEST by merger, is the primary incumbent local exchange carrier ("ILEC") in fourteen western states. As such, it is extensively regulated under the Telecommunications Act of 1996 ("1996 Act"), which obligates each ILEC to cooperate in helping competitors enter its local telephone markets. *See generally Verizon Communications Inc.* v. *FCC*, 535 U.S. 467 (2002). To serve customers of their own, these new entrants, known as competitive local exchange carriers ("CLECs"), may avail themselves of an ILEC's network facilities and service offerings in three different respects. First, they may build their own facilities and demand interconnection with the ILEC's network. 47 U.S.C. § 251(c)(2), (6). Second, they may lease pieces ("elements") of the ILEC's network at low, regulated rates. 47 U.S.C. §§ 251(c)(3), (d)(2), 252(d)(1); *see generally Verizon*, 535 U.S. at 491-92; *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Finally, they may purchase an ILEC's retail telephone services at discounted wholesale rates and resell them to end users. 47 U.S.C. §§ 251(c)(4), 252(d)(3).

By requiring a specific set of companies—the ILECs—to take extraordinary measures to help their competitors displace them in the market, these provisions created "something brand new" in American regulation. *Verizon*, 535 U.S. at 528. Both this Court and Congress have recognized that this change is "extraordinary" in that it "give[s] aspiring competitors every possible incentive to enter local retail telephone markets" (*id.* at 489), and requires ILECs to help "competitors come in and try to beat [their] economic brains

out." *Id.* at 488 (quoting 141 Cong. Rec. S15572 (daily ed. 1995) (statement of Sen. Breaux)).[1]

The statutory rights created by the 1996 Act are enforceable by expert regulatory agencies: the Federal Communications Commission ("FCC") and individual state public utilities commissions. The FCC has issued, and regularly updates, exhaustive rules detailing the terms on which ILECs must make their services and facilities available to CLECs—rules that, as this Court has recognized, are aggressively procompetitor. *Verizon*, 535 U.S. at 488-92. And, under a separate provision of the Act, the largest ILECs—the Bell operating companies, including Qwest—are barred from entering the long distance markets in their respective local service areas until after they have proven to the FCC that, among other things, they have fully opened their local markets to competition by complying with their underlying regulatory obligations. *See* 47 U.S.C. § 271. Qwest has made that showing for the state of Washington,[2] just as it has for twelve of its thirteen remaining states.

The state commissions play a pervasive role as well in ensuring the openness of local markets to all forms of facilities-based and resale-oriented competition. ILECs must enter into "interconnection agreements" with CLECs that flesh out exactly how the former will help the latter "beat [their] economic brains out" (*Verizon*, 535 U.S. at 488 (quotation marks omitted)), through the exercise of their new leasing, inter-

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[1] *See also* Brief for Petitioner at 2, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, *cert. granted*, No. 02-682 (Mar. 10, 2003) ("Verizon *Trinko* Br."); Brief for the United States and the Federal Trade Commission as *Amici Curiae* Supporting Petitioner in *Trinko*, *supra*, at 3 ("U.S. *Trinko* Br.").

[2] *See* Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, 17 FCC Rcd 26303 (2002).

connection, and resale rights. *See* 47 U.S.C. § 252. State commissions arbitrate unresolved issues between ILECs and CLECs (47 U.S.C. § 252(b)(1)) and retain continuing authority thereafter to interpret and enforce the terms of the ensuing interconnection agreements.[3]

B. Factual History

This case involves the sale of a telecommunications service called "Centrex" to small businesses in the Seattle/Tacoma area. Centrex is a product that combines multiple-line access and calling "features" (such as call-forwarding and four-digit dialing within an organization) by means of special software in a telephone company switch. The Washington Utilities and Transportation Commission ("WUTC") regulates the retail price of the access component of Centrex service but not the features component, having found the latter competitive. Pet. App. 14a. Nonetheless, features are included within the "switching" network element that, since 1996, CLECs have been entitled to lease from ILECs under the *federal* law governing *wholesale* relationships between carriers. *See Iowa Utils. Bd.*, 525 U.S. at 387 ("vertical switching features, such as caller I.D., are functions provided by means of the switch, and thus fall squarely within the statutory definition" of network element) (internal quotation marks and ellipsis omitted); First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 413 (1996), *aff'd in part, rev'd in part sub nom. AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) (requiring unbundling of switching element under 47 U.S.C. § 251(c)(3)) ("*Local Competition Order*"). And the FCC has separately

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[3] *See, e.g., BellSouth Telecomm., Inc.* v. *MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1274-76 (11th Cir. 2003) (en banc); *Bell Atlantic Md., Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d 279, 304 (4th Cir. 2001), *vacated on other grounds sub nom. Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635 (2002).

concluded that "vertical switching features should be available to competitors through the resale provision of section 251(c)(4)." *Local Competition Order* at ¶ 413.

Large business customers normally choose between (i) buying Centrex services from the telephone company and (ii) purchasing their own internal switching equipment—known as Private Branch Exchanges ("PBXs")—from telecommunications equipment vendors. In the 1980s, to compete more effectively against the PBX option for these large business customers in Seattle and Tacoma, Qwest began offering a substantial volume discount on Centrex services to customers purchasing 21 or more lines. Pet. App. 5a. Qwest did not offer these discounts to smaller business customers, because it rarely makes economic sense for such customers to incur the high fixed cost of a PBX. Extending to smaller customers the same Centrex discount that Qwest provided to larger customers would have only reduced Qwest's revenues from ordinary business lines (known as "1FB" lines). *Id.*

Respondent MetroNet is a reseller of telecommunications services in the Seattle/Tacoma area. As early as 1985, MetroNet and other resellers recognized that the difference between the volume-discounted Centrex rates and the 1FB rates created an arbitrage opportunity. These resellers began purchasing Centrex services at the volume-discounted rates and reselling them to small businesses (*i.e.*, those with less than 21 lines) that would not otherwise qualify for the volume discounts—but that also had little incentive to purchase a PBX switch. Pet. App. 5a-6a. Such sales eroded Qwest's own sales of 1FB lines to these small business customers. Qwest estimated that it was losing $300,000 in 1FB revenues per month to resellers and concluded as well that the loss of direct contact with these customers was costing it important opportunities to sell other services to them. *Id.* at 7a. In April 1997, Qwest sought to limit the availability of the volume features discount to the particular customers—those with more than 21 lines in a given location—for whom it was

genuinely needed to compete against the PBX alternative. *Id.* at 6a-8a.

Notwithstanding this pricing change, MetroNet and other resellers continued to resell Centrex services successfully to small business customers without the features discount. Pet. App. 9a.[4] In February 1998, however, Qwest complied with a new rate order of the WTUC by reducing the prices of 1FB lines by 31 percent.[5] *Id.* at 15a. Following this price cut, MetroNet began to lose customers, and its entire sales force resigned. *Id.* Other resellers, however, continued successfully reselling Centrex services in competition with Qwest. *Id.* at 12a n.14. As late as October 2000, resellers continued to sell more than 60,000 Centrex lines to small business customers; these sales constituted 31 percent of the total Centrex market. *Id.*

C. Procedural History

On January 10, 2000, MetroNet filed this lawsuit, alleging that Qwest's change in the pricing of Centrex violated Section 2 of the Sherman Act. In a nutshell, MetroNet contended that Qwest had a monopoly over local telephone service for small businesses in the Seattle/Tacoma area and that Qwest, by raising the price it charged MetroNet for Centrex features, had denied MetroNet access to a "facility" essential to MetroNet's resale business.

The district court granted summary judgment to Qwest. Pet. App. 61a. The court held that because the 1996 Act independently required Qwest during all relevant periods to

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[4] Resellers continued to receive the full discount on Centrex access. *See Washington Utils. & Transp. Comm'n* v. *U S West Communications, Inc.*, 169 P.U.R. 4th 417, 1996 WL 350826 (Wash. U.T.C. Apr. 11, 1996) (abolishing per location pricing on the access component of Centrex).

[5] In 1997, Qwest also introduced a new discount program, Centrex 21, that was targeted at small to medium business customers. This program offered discounts to small and medium businesses ordering three or more lines. Pet. App. 13a.

provide pervasive access to its local exchange network, MetroNet could not show that Qwest was a monopolist in control of an essential facility or that it could have engaged in unlawful exclusionary conduct. *Id.* at 51a-52a, 56a-57a. The court added that MetroNet could not show that Qwest's change in pricing policy had harmed *competition*—a prerequisite to a finding of exclusionary conduct—because it could not show harm to consumer welfare: "Qwest produced unrebutted evidence that the overall cost of Centrex to consumers dropped significantly when the local phone markets were opened up to competition under the Telecom Act. The fact that competition in the local business phone service market can keep the price of Centrex overall below the pre-price-change level is sufficient to constitute no harm to consumer welfare." *Id.* at 58a.

The court of appeals reversed. Pet. App. 45a.[6] Although it considered the matter "a close question" (*id.* at 4a), it held that MetroNet had presented triable issues of fact as to its antitrust claims. Relying on the 1996 Act's antitrust savings clause (*see* Pub. L. No. 104-104, § 601, 110 Stat. 56), the court first held that Qwest was not impliedly *immune* from antitrust liability. Pet. App. 18a-22a. In so ruling, the court knocked down a straw man. Qwest did not argue for immunity from the antitrust laws; it argued only that the 1996 Act forecloses a necessary element of antitrust liability by ensuring rivals regulated access to Qwest's network. *See Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000).

Turning to the merits, the court first addressed MetroNet's claim that Qwest had illegally maintained a monopoly for "small business local telephone services" in the Seattle/Tacoma area. Pet. App. 23a-28a. Despite the market-opening provisions of the Act, the court concluded that

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[6] The court of appeals affirmed the district court's grant of summary judgment for Qwest with respect to MetroNet's motion to enforce a purported settlement agreement with Qwest. Pet. App. 45a.

Qwest could still exclude competition from that market and control prices, citing its ability to increase the price of Centrex features to customers not qualifying for the per location discount. *Id.* at 28a-32a. The court further concluded, contrary to established antitrust jurisprudence and basic economic principles (*see* pp. 15-20, *infra*), that Qwest's actions in limiting the availability of its discounts to large business customers through the per location requirement could be found exclusionary even though such price increases generally promote competition rather than stifle it. *See Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 275 n.12 (2d Cir. 1979) ("high prices, far from damaging competition, invite new competitors into the monopolized market"). The Ninth Circuit separately held that MetroNet could establish liability under the controversial "essential facilities" doctrine recognized in some lower courts (Pet. App. 36a-41a), simply by proving that it could not continue to earn a profit reselling Qwest Centrex services without that discount, even though the 1996 Act separately gives rivals full access at regulated, pro-competitive rates to Qwest's facilities and services. *See* 47 U.S.C. § 251(c)(3), (c)(4), (d)(2).

REASONS FOR GRANTING THE PETITION

Although, as discussed below, the Ninth Circuit's decision is both erroneous and highly detrimental to the sound development of antitrust law, this petition should be held pending this Court's disposition of *Trinko*. The Court's decision in that case will provide guidance on (i) whether, and to what extent, an "essential facilities" doctrine provides an independent basis for liability under the antitrust laws; (ii) the appropriate standard for exclusionary conduct under Section 2 of the Sherman Act; and (iii) the complex relationship between the antitrust laws and the 1996 Act.[7] All three of those issues are squarely presented here as well. If, in *Trinko*, this

[7] *See, e.g.*, Verizon *Trinko* Br. at 14-27, 34-45.

Court adopts positions similar to those urged by Verizon or the Solicitor General, any arguable basis for the Ninth Circuit's decision in this case will collapse, and the Court should accordingly grant this petition, vacate the decision below, and remand for further proceedings. Alternatively, in the unlikely event that the Court fails to resolve the antitrust issues presented in *Trinko*, this petition should be granted and the case heard on the merits.

I. THE DECISION BELOW IMPROPERLY EXPANDS ANTITRUST "DUTIES TO DEAL"

The Ninth Circuit, much like the Second Circuit in *Trinko*, held that MetroNet could seek to establish antitrust liability under the so-called "essential facilities" doctrine by showing that its business problems stemmed from Qwest's failure to provide access to certain of its local exchange operations on terms that would help MetroNet and others siphon off Qwest's short term and long term 1FB profits.[8] That holding is wrong, and it underscores why, as the federal government's own antitrust authorities urge in *Trinko*, this Court should clarify that there is no independent "essential facilities" basis for liability under the Sherman Act. At a minimum, whatever the scope of such liability in other contexts, an "essential facilities" doctrine should not be extended to reach the conduct at issue in this case, because Qwest is already subject to pervasive regulation designed to open the local telephone markets to competition.

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[8] *Compare* Pet. App. 35a-36a ("The 'essential facilities' doctrine imposes on the owner of a facility that cannot reasonably be duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors on a nondiscriminatory basis.") *with Law Offices of Curtis V. Trinko* v. *Bell Atlantic Corp.*, 305 F.3d 89, 107 (2d Cir. 2002) ("a monopolist has a duty to provide competitors with reasonable access to 'essential facilities,' facilities under the monopolist's control and without which one cannot effectively compete in a given market").

A. The Antitrust Laws Impose No Affirmative Duty To Share Facilities With Rivals

It is a fundamental tenet of antitrust law that, "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919). There is no "essential facilities" exception to this principle, despite the contrary suggestion of some lower courts in a handful of cases.[9]

As the Solicitor General explains in *Trinko*, the so-called "essential facilities doctrine" adopted by those courts has been widely criticized, and it cannot properly "establish an independent antitrust tort" absent "proof of exclusionary conduct." U.S. *Trinko* Br. at 20-22; *see also Iowa Utils. Bd.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part). The leading antitrust treatise is blunter still: "the essential facility doctrine is both harmful and unnecessary and should be abandoned." 3A Areeda & Hovenkamp, *Antitrust Law*, ¶ 771c, at 173 (2d ed. 2002). And nothing in this Court's precedent is to the contrary. The two decisions of this Court sometimes cited as support for a stand-alone duty to sell rivals access to "essential facilities"—*Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), and *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)—do not remotely establish such a duty. Those decisions recognize liability only where a dominant firm's failure to deal with rivals serves no valid business objective and has

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[9] *See* Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 Stan. L. Rev. 1187, 1190-93 (1999) (describing cases applying an "essential facilities" doctrine); *id.* at 1248 ("American courts have mandated access to a facility deemed "essential" in only a small number of cases.").

the sole purpose of creating or maintaining a monopoly.[10] And any conduct that is truly exclusionary in that sense can be reached under Section 2 without any need for an independent essential facilities doctrine. *See* Point II, *infra*.

Recognition of any "essential facilities" doctrine is not just unnecessary in that sense, but affirmatively harmful as well, because requiring a monopolist to share its facilities with rivals is as likely to stifle competition as to promote it. Again, this case illustrates why. The conduct at issue here did not involve an outright refusal on Qwest's part to make its facilities available to MetroNet. To the contrary, Qwest, throughout the period of the litigation, continued to sell Centrex service to MetroNet and to other resellers on exactly the same terms as to its other customers. The Ninth Circuit nonetheless held that, to establish liability under the essential facilities doctrine, all MetroNet needed to show is that "per location pricing made the Centrex resale business unprofitable, or squeezed the profit margin to the point where the game was no longer worth the candle." Pet. App. 40a. Under this standard, any company that seeks to raise the prices

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[10] In *Otter Tail*, the district court had found that the defendant's "refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position," because "[t]here were no engineering factors that prevented [it] from selling power at wholesale to those towns that wanted municipal plants or wheeling the power." 410 U.S. at 378. In addition, the defendant had engaged in a variety of other exclusionary acts, including sham litigation and per se unlawful territorial allocation agreements with other suppliers of power. *Id.* at 378-80. Similarly, in *Aspen Highlands*, the Court affirmed a jury verdict against the defendant because it found that "the evidence supports an inference that [the defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival," thereby confirming that the sole purpose was to maintain its monopoly. 472 U.S. at 610-11. "*Aspen* . . . . certainly does not hold that a monopolist must make its goods, services, or facilities available at a competitive rather than a monopolistic price." 3A Areeda & Hovenkamp, *supra*, ¶ 772c, at 188; *see also Aspen Highlands*, 472 U.S. at 611 n.44.

at which it has been providing its rivals access to an "essential facility" would have a strong incentive to hold a "price umbrella" over those rivals by not later lowering its prices to its own retail customers, lest the rivals complain that they can no longer profitably compete. This is exactly the opposite of the aggressive price-reducing competition the antitrust laws seek generally to encourage.[11]

B. Applying An "Essential Facilities" Doctrine To The Conduct At Issue Would Be Particularly Inappropriate, As Qwest Is Already Subject To Extensive Duties To Deal Under The 1996 Act

The 1996 Act assures rivals access to a broad range of ILEC facilities or services that may be essential to competition, and it does so on terms that are designed to foster competition in local telephone markets while maintaining the incentives for both incumbents and new entrants to invest in new facilities. *See generally United States Telecom Ass'n* v. *FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002), *cert. denied sub nom. WorldCom, Inc.* v. *U.S. Telecom Ass'n*, 123 S. Ct. 1571 (2003). Congress was particularly concerned that too-liberal access rights would "reduce[] the incentives" of CLECs and

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[11] *See* 3A Areeda & Hovenkamp, *supra*, ¶ 771b, at 171 ("Forcing a firm to share its monopoly is inconsistent with antitrust basic goals for two reasons. *First*, consumers are no better off when a monopoly is shared; ordinarily, price and output are the same as they were when one monopolist used the input alone. *Second*, the right to share a monopoly discourages firms from developing their own alternative inputs."). *Compare Ball Mem'l Hosp., Inc.* v. *Mutual Hosp. Ins. Inc.*, 784 F.2d 1325, 1339 (7th Cir. 1986) ("[e]ven the largest firms may engage in hard competition, knowing that this will enlarge their market shares"), *with Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) ("a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches"). *See also Blue Cross & Blue Shield United* v. *Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995) ("[c]onsumers are not better off if the natural monopolist is forced to share some of his profits with potential competitors").

ILECs alike "for innovation and investment in facilities": "[i]f parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines." *Id.*; *see also Iowa Utils. Bd.*, 525 U.S. at 387-92 (invalidating permissive FCC reading of "impairment" threshold for leasing rights under 47 U.S.C. § 251(d)(2)). Entitling resellers like MetroNet to treble damages under the "essential facilities" doctrine, beyond what they could obtain under the 1996 Act itself, would be worse than unnecessary: it would upset this delicate statutory balance and threaten Congress's plan for promoting long-term facilities-based competition.[12]

Even if it were somehow appropriate to apply an "essential facilities" doctrine in any setting covered by the 1996 Act, it would be entirely inappropriate to apply it in this case. "A facility that is controlled by a single firm will be considered 'essential' only if control of the facility carries with it the power to *eliminate* competition in the downstream market." *Alaska Airlines*, 948 F.2d at 544 (emphasis in original). Here, Qwest cannot eliminate such competition, because the 1996 Act gives MetroNet and other rivals abundant opportunities to use Qwest's facilities and services as a means of entering local telecommunications markets. To be sure, the 1996 Act does not by its terms entitle new entrants to the precise volume discounts that MetroNet enjoyed before Qwest imposed the per location requirement. But even in its most extravagant forms, the essential facilities doctrine has

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[12] Pursuant to these provisions, Qwest and MetroNet entered into an interconnection agreement under the 1996 Act in August 2000, and that agreement is enforceable by federal and state regulatory authorities. While MetroNet complains that the terms of that agreement are not as favorable as the terms on which it was able to purchase Centrex from Qwest before its change in pricing policy, Pet. App. 38a n.28, that is hardly the basis for an antitrust claim. *See Alaska Airlines, Inc.* v. *United Airlines, Inc.*, 948 F.2d 546, 549 (9th Cir. 1991) (gaining a "monetary profit at . . . rivals' expense . . . is not actionable under Section 2").

never been understood to give entrants rights of access not just to *facilities*, but also to a particular discounted *price*. To expand the concept of access to an essential facility in this way is, as we argue below, to discourage companies from ever offering discounts in the first place.

II. THE DECISION BELOW APPLIES A TEST OF EXCLUSIONARY CONDUCT IN CONFLICT WITH THIS COURT'S PRIOR DECISIONS

MetroNet's "essential facilities" and "exclusionary conduct" claims involve the same underlying conduct. Although the Ninth Circuit treated them as independent bases of liability, they are two sides of one coin, and each is flawed for much the same reasons. The court's erroneous analysis of the exclusionary conduct ("monopolization") claim provides an additional reason to hold this case pending this Court's disposition of *Trinko*, which presents similar questions about what constitutes exclusionary conduct under the Sherman Act, or to reverse the Ninth Circuit's decision outright.

"'[E]xclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Highlands*, 472 U.S. at 605 n.32 (quoting 3 P. Areeda & D. Turner, *Antitrust Law* 78 (1978)). As the Solicitor General explains in *Trinko*, this test can be met only if the conduct "would make no economic sense . . . *but for* its tendency to eliminate or lessen competition." U.S. *Trinko* Br. at 15 (emphasis added). That was the case, for example, in *Aspen Highlands* itself, where the defendant had *sacrificed* short term profits, and penalized customers for dealing with a rival, for only one discernible reason: to put the rival out of business and thereafter recoup the lost short term profits.[13]

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[13] The defendant Skiing Co., which owned three of the four mountains in the Aspen area, "deterred [skiers] from skiing at Highlands," the competing ski facility, which owned the fourth mountain, by imposing

The conduct at issue here is the exact opposite of the conduct deemed anticompetitive in *Aspen Highlands*. The very point of Qwest's decision to impose a per location requirement was to *increase* its short term (as well as long term) profits by targeting its discounts more precisely to the large business customers that would otherwise reject Centrex altogether in favor of the PBX option. Such profit maximization inarguably makes "economic sense" (U.S. *Trinko* Br. at 15) quite apart from any desire to disadvantage rivals; indeed, it is the very essence of competition on the merits. *See, e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Exposing a firm to liability for such conduct, as the Ninth Circuit did below, is inconsistent with the antitrust principles adopted by this Court, with the Solicitor General's position in *Trinko*, and with the holdings of other courts of appeals. *See, e.g.*, *Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 523 (5th Cir. 1999) ("[g]enerally, a finding of exclusionary conduct requires some sign that the monopolist engaged in behavior that—examined without ref-

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additional costs on them if they did so. *Aspen Highlands*, 472 U.S. at 610. To accomplish this objective, the defendant not only discontinued a popular "All-Aspen," 4-mountain, 6-day ski pass it had previously offered jointly with Highlands, but it also discontinued its own 3-area, 3-day pass and refused to accept coupons issued by Highlands for ski tickets at the defendant's mountains even though Highlands was willing to pay the full retail price for those tickets. *Id.* at 593-94. The combined effect of these actions was to force skiers who wanted to ski Highlands either to forgo the convenience and cost savings of a discounted multi-mountain, multi-day pass or to pay to ski on Skiing Co.'s mountains even on days they skied at Highlands. *See also Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (finding liability where monopoly newspaper rejected advertising from those who had advertised with a competitor, thereby forcing customers to forgo advertising in the newspaper as the price of placing any advertising whatsoever with the competitor); *United States* v. *Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) (alleging that per processor license under which computer manufacturers paid Microsoft a royalty on all processors shipped even if they did not have Microsoft Windows installed on them violated Section 2).

erence to its effects on competitors—is economically irrational"); *General Indus. Corp.* v. *Hartz Mountain Corp.*, 810 F.2d 795, 803 (8th Cir. 1987) (conduct is anticompetitive only if "its anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power") (quotation marks omitted).

Although the Ninth Circuit erroneously held otherwise (Pet. App. 30a), the fact that Qwest's per location requirement raised retail rates for smaller business customers cuts *against*, not *for*, a finding of antitrust liability. Section 2 does not outlaw monopoly per se and does not prohibit a monopolist "from charging as high a price for its product as the market will accept." *Berkey Photo*, 603 F.2d at 275 n.12.[14] Quite to the contrary, "high prices, far from damaging competition, invite new competitors into the monopolized market." *Id.* Here, the higher prices paid by smaller business customers made Qwest more susceptible to competitive entry through the comprehensive regulatory mechanisms established under the 1996 Act.

The Ninth Circuit nonetheless viewed it as the province of antitrust law to regulate the ordinary pricing decisions of a dominant firm, even when they maximize the firm's short term profits, to preclude any "harm to consumer welfare" generally. *See* Pet. App. 28a-30a. This is wrong on two levels. First, as the Solicitor General explains in *Trinko*, it is the proper role of administrative agencies, not antitrust courts, to regulate the normal profit-maximizing business conduct of dominant firms in concentrated industries to promote broader

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[14] *See Endsley* v. *City of Chicago*, 230 F.3d 276, 283-84 (7th Cir. 2000) (price increase by monopolist is not an act of monopolization); *Olympia Equip. Leasing Co.*, 797 F.2d at 376 ("A monopolist has no duty to reduce its prices in order to help consumers."); *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984) (Breyer, J.) ("even a monopolist is free to exploit whatever market power it may possess").

societal interests in "consumer welfare." *See* U.S. *Trinko* Br. at 18.[15]

Second, this case amply illustrates the importance of that institutional limitation on the role of antitrust courts, because penalizing a firm under these circumstances simply undermines, rather than promotes, net "consumer welfare." The Ninth Circuit's basic error was to view Qwest's per location pricing decision in isolation rather than as a necessary component of a larger discount program that, considered as a whole, represents welfare-enhancing competition on the merits.[16] Any firm in Qwest's position would face powerful disincentives to offer volume discounts in the first place if, under prevailing antitrust principles, it must thereafter fear treble liability whenever it takes steps to target the discounts only to customers who otherwise would not buy its products. Here, the per location requirement was needed to preclude resale arbitrage that was eroding Qwest's profits by making its volume discounts on Centrex features available to small

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[15] By holding that supracompetitive pricing constitutes "prima facie evidence" of exclusionary conduct, the Ninth Circuit not only diverged from well-established case law, but also misapplied its own prior decision in *Rebel Oil Co.* v. *Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995). In that case, the court held that *one of four* elements of predatory pricing is antitrust injury and that, to prove such injury, a plaintiff must demonstrate that the price cuts would have enabled the defendant to charge supracompetitive prices once its rivals exited the market. *See id.* at 1433 (holding that an act is anticompetitive when it "harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality") (emphasis in original). That is a separate question from whether conduct is exclusionary. *See* 3 Areeda & Hovenkamp, *supra*, ¶ 721d, at 266-68 ("[P]rice discrimination is 'exclusionary' only to the extent that it increases output. When price discrimination results in lower output, no rival or potential rival is excluded. . . . If anything, the higher price offered to the disfavored purchasers tends to draw more competition into the market.").

[16] *Cf. Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("the duty of the jury was to look at the whole picture and not merely at the individual figures in it").

business customers for whom they were not needed to compete with PBX. Such "differential pricing" is a legitimate, efficiency-enhancing business practice.[17] And it is legally and economically unsound to insist, as the Ninth Circuit did, on a narrowly "cost-based or volume-based justification" (Pet. App. 30a) for limiting discounts to those customers that would otherwise take their business elsewhere. *See Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993) ("Congress did not intend to outlaw price differences that result from or further the forces of competition.").[18]

"One problem that haunts most antitrust litigation . . . is that vigorous competition may look very similar to acts that *undermine* competition and support monopoly power. The resulting danger is that the courts will prohibit, or the antitrust authorities will prosecute, acts that *appear* to be anticompetitive but that really are the opposite."[19] That is what has happened here, and the precedential consequences are unsettling not just for Qwest, but for any other large firm op-

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[17] *See In re Brand Name Prescription Drugs Antitrust Litigation*, 288 F.3d 1028, 1032 (7th Cir. 2002) ("[s]ince price discrimination is not (in general) unlawful, neither are efforts to prevent arbitrage"); *see also* 8 Areeda & Hovenkamp, *Antitrust Law*, *supra*, ¶ 1616f, at 226 ("[P]rohibition [of price discrimination] would worsen consumer welfare if—as I tend to believe—prohibiting the restraint would lead the manufacturer . . . to maintain the higher wholesale price while adopting more costly or less effective strategies for reaching low-price customers, or even . . . to abandon his efforts to reach those customers altogether. I therefore regard price discrimination in aid of deep market penetration as a benefit.").

[18] Even the Robinson-Patman Act, 15 U.S.C. § 13(a), which prohibits price discrimination in the sale of commodities where the effect may be substantially to lessen competition, treats the need to meet competition as a legitimate business justification for differential pricing. *See Brooke Group*, 509 U.S. at 220.

[19] William J. Baumol & Alan S. Blinder, *Economics: Principles and Policy* 425-26 (8th ed. 2000).

erating in the Ninth Circuit. This Court's intervention is needed to preclude the Ninth Circuit's unsound antitrust logic from deterring such firms from engaging in perfectly sensible business practices that, from an appropriately broad perspective, enhance consumer welfare rather than threaten it.

CONCLUSION

The petition for writ of certiorari should be held pending the Court's disposition of *Trinko* and disposed of as appropriate in light of the resolution in that case. If the Court fails to resolve the antitrust issues presented in *Trinko*, it should grant this petition outright and hear this case on the merits.

Respectfully submitted,

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AUGUST 11, 2003

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Metronet Services Corporation;
Metronet Telemanagement Corporation,
Plaintiffs-Appellants,
v.
US West Communications,
Defendant-Appellee.

No. 01-35406

Argued and Submitted Oct. 10, 2002
[329 F.3d 986]
Filed March 31, 2003
Amended May 21, 2003

Before BROWNING, FISHER and TALLMAN, Circuit Judges.

ORDER

FISHER, Circuit Judge.

The panel has voted to deny appellees' joint petition for panel rehearing and petition for rehearing en banc, filed April 21, 2003.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The opinion filed March 31, 2003, is amended as follows:[*]

[* This Appendix reprints the Ninth Circuit decision as it appears in the Federal Reporter. The opinion reprinted here already contains the

At slip op. 4495, line 9, replace the sentence beginning "It is undisputed" with the following:

> It is undisputed that per location pricing has no cost-based justification, *compare Oahu Gas,* 838 F.2d at 368 (economic necessity justified allegedly exclusionary conduct), and Qwest has not suggested how per location pricing enhances efficiency or improves the products offered to consumers, *see Microsoft,* 253 F.3d at 59.

At slip op. 4503, line 3, italicize "any."

At slip op. 4503, line 5, replace the phrase "but the second is erroneous." with "; the second overstates MetroNet's burden."

At slip op. 4503, line 8, insert the phrase "due to per location pricing" between the words "profitability" and "was".

At slip op. 4503, line 13, replace the sentence beginning "As to the second requirement" and the accompanying citation with the following:

> As to the second requirement, MetroNet need not prove that all of its financial woes were caused by per location pricing; rather, it must show that the financial harm attributable to per location pricing—apart from the financial harm due to other causes—was alone sufficient to drive it out of the market. *See Alaska Airlines,* 948 F.2d at 545-46.

At slip op. 4503, line 18, insert the phrase "and other resellers" after "driving it".

At slip op. 4503, line 32, add the following sentence after "this evidence of the injury to MetroNet is weak.": "So too is the evidence of injury to other resellers."

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amendments to the original opinion previously issued by the Ninth Circuit.]

At slip op. 4504, line 1, replace the phrase "has had the effect of driving MetroNet away" with "alone had a sufficiently adverse financial impact to drive MetroNet and other resellers away." Also, add the following:

Id. at 546 ("When a firm's power to exclude rivals from a facility gives the firm the power to *eliminate* competition in a market downstream from the facility, and the firm excludes at least some competitors ... a finding of monopolization, or at least attempted monopolization, is appropriate ..." (emphasis in ***992** original)). Qwest came forward with some evidence of other reasons for MetroNet's unprofitability, but this evidence is insufficient to resolve the issue in Qwest's favor on summary judgment.

The panel having adopted these amendments, appellees' joint petition for panel rehearing and petition for rehearing en banc, filed April 21, 2003, is DENIED.

OPINION

This antitrust case involves the market for small business local telephone services in the Seattle/Tacoma area. Defendant-Appellee Qwest, formerly known as "U S West," owns the local telephone network in 14 western states, including Washington. In addition to selling basic flat-rate business lines, Qwest also sells "Centrex," a product offering volume discounted phone line access and calling features (e.g., voice mail and call forwarding) to businesses with more than 20 phone lines. Plaintiffs-Appellants MetroNet Services Corp. and MetroNet Telemanagement Corp. ("MetroNet") purchase Centrex from Qwest and resell it to small businesses in the Puget Sound region with 20 or fewer phone lines. By aggregating the phone lines of these small businesses, MetroNet is able to meet the Centrex 21-line minimum and pass on Centrex volume discounts to MetroNet's customers. In 1997, Qwest changed the pricing structure of the features component of Centrex in order to eliminate resale of both the access

and features components. By requiring that each *location* receiving discounted Centrex features have at least 21 lines, Qwest's new pricing scheme rendered MetroNet's customers ineligible for the volume discount on features. MetroNet claims that Qwest's imposition of "per location pricing" violated Section 2 of the Sherman Act by illegally maintaining a monopoly over the market for small business local telephone services in Seattle/Tacoma, and by denying MetroNet access to an essential facility. MetroNet appeals the district court's grant of summary judgment in favor of Qwest, arguing that the district court ignored conflicting evidence, improperly weighed evidence and failed to view the facts in the light most favorable to the nonmoving party, MetroNet.[1] MetroNet also appeals the district court's denial of its motion to enforce a written but unsigned settlement agreement with Qwest.

We hold that at this stage in the proceedings, the district court's grant of summary judgment was in error. Although it is indeed a close question, we hold, viewing the record in the light most favorable to MetroNet, that MetroNet has created triable issues of fact sufficient to proceed on its antitrust claims. We affirm the district court's denial of MetroNet's motion to enforce its settlement agreement with Qwest.

FACTUAL AND PROCEDURAL HISTORY

Qwest sells two types of business phone services relevant to this antitrust suit: flat-rate local exchange lines called "1FB lines,"[2] and "Centrex." Centrex consists of two components: multiple telephone line access that allows a company's employees to make internal calls using a four-digit extension and external calls via the Qwest central office

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[1] MetroNet has not challenged on appeal the district court's grant of summary judgment on its claim of attempted monopolization under Section 2 of the Sherman Act.

[2] "F" stands for "flat-rate" and "B" stands for "business." Flat-rate residential service is known as "1FR."

switch (the access component), and calling features such as call forwarding, call waiting and call hold (the features component).[3] The access component ***993** of Centrex is regulated by the Washington Utilities and Transportation Commission ("WUTC"), while the features component is not.[4] Although each component is priced separately, Qwest sells them as one bundled product, requiring customers who buy one component to buy the other as well.

Qwest originally developed Centrex for the large business market as an alternative to the private branch exchange ("PBX"), a switch owned by large businesses and located on their property.[5] Centrex obviated the need for such a switch and provided significant volume discounts to businesses with more than 20 phone lines. Small businesses with 20 or fewer lines could not take advantage of Centrex volume discounts; instead, they could purchase Centrex without the discount, or purchase 1FB lines from Qwest and features for an additional fee.[6]

As early as 1985, MetroNet and other resellers began purchasing volume discounted Centrex lines from Qwest and reselling them to aggregations of small businesses, each with 20 lines or fewer. The resellers thereby allowed small busi-

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[3] MetroNet stresses that the access component itself consists of two subcomponents: the physical line between the customer and Qwest's switch, called the network access channel ("NAC"), and a device that limits the number of lines that have access, called the network access register ("NAR"). Because our analysis does not depend on this further level of detail, we do not refer to it in the text.

[4] The WUTC deregulated the features component in 1987. *See Wash. Utils. & Transp. Comm'n v. Pac. Northwest Bell Tel. Co.*, 83 P.U.R.4th 380, 1987 WL 257925 (Wash. U.T.C. Apr. 7, 1987).

[5] A PBX allows four-digit internal calling and can provide some features. External dialing is done through Qwest's local network using a "trunk line" that connects the customer's PBX to the Qwest network.

[6] It is unclear from the record whether small business customers choosing to purchase 1FB lines could also buy features from providers other than Qwest.

nesses to take advantage of the volume discounts previously available only to large businesses. MetroNet reaped profits by reselling Centrex at a price above what it cost MetroNet to purchase Centrex from Qwest but below what MetroNet's customers would have had to pay for 1FB lines plus features.

"PER LOCATION PRICING"

By 1991, Qwest had taken note of the significant resale market for Centrex created by the differential pricing of Centrex and 1FB lines.[7] Qwest sought to introduce a new version of Centrex, Centrex Plus, with a pricing structure designed to "eliminate or reduce" the "arbitrage" between Centrex and 1FB lines. Under the old Centrex product, Qwest charged Centrex customers, including resellers like MetroNet, based on the number of phone lines included in the Centrex package, regardless of whether those lines ran to a single location or multiple, separate locations. This policy of "system pricing" allowed resellers to obtain the volume discounts of a single large business by aggregating the telephone lines of several variously located small businesses. With the introduction of Centrex Plus, however, Qwest intended to shift from system pricing to "per location pricing," requiring customers to have more than 20 lines *at each location* in order to receive a volume discount for the service to that location. Because the resellers' customers have 20 or fewer lines, Qwest's shift to per location pricing ***994** would eliminate the resellers' ability to pass on the Centrex volume discount.

Qwest had to seek WUTC approval for the new pricing structure because per location pricing was to apply not only to the unregulated features component of Centrex, but also to

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[7] The pricing differential between Centrex and 1FB lines had become so great that a significant number of small business customers were purchasing Centrex from resellers rather than 1FB lines from Qwest.

the regulated access component.[8] The WUTC conditionally approved per location pricing of Centrex Plus on November 18, 1993, and finally approved it on November 30, 1994. However, a year and a half later, on April 11, 1996, the WUTC abolished per location pricing and ordered that system pricing be reinstated. *See Wash. Utils. & Transp. Comm'n v. U.S. West Communications, Inc.*, 169 P.U.R. 4th 417, 1996 WL 350826 (Wash. U.T.C., Apr. 11, 1996). The WUTC found that "the existing arrangements are discriminatory and in practice operate to benefit [Qwest]." *Id.*

Qwest viewed the WUTC order as "exasperating dramatically the existing revenue arbitrage situation" and appealed. The Washington Supreme Court upheld the WUTC order. US West Communications, Inc. v. Wash. Utils. & Transp. Comm'n, 134 Wash.2d 74, 949 P.2d 1337, 1364 (Wash.1997).

In December 1996, with system pricing back in place, Qwest concluded that:

> The current Washington tariff structure for Centrex Plus, [1FB], and features offers a profitable, relatively low risk opportunity for Centrex resellers to win significant market share of 1FB customers (mainly small business) in Washington. In essence, it appears that resellers can operate with positive margins while reselling [Centrex] at anywhere from 10 to 35 percent discounts to [1FB lines], not including features.

Qwest estimated that it was losing more than $300,000 in revenues per month to MetroNet and other resellers, and that the revenue loss was having a "significantly negative" impact on profitability. In addition to these financial concerns, Qwest was greatly troubled that the loss of its direct

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[8] To be more precise, the per location pricing scheme applied to the NAC subcomponent of Centrex access, not the NAR subcomponent. *See* note 3 *supra*.

relationship with customers due to resale would deprive it of the opportunity to cross-sell additional products and services. Qwest concluded that "no existing or forthcoming product ... effectively addresses Centrex resale competition," and set about developing strategies to win back market share.

On April 18, 1997, Qwest filed a "price list" with the WUTC reinstating per location pricing for the deregulated features component of Centrex. This later imposition of per location pricing is the subject of the present suit. As a result, the small business customers of resellers such as MetroNet had to pay dramatically higher prices for Centrex features.[9]

MetroNet's chief executive officer, Kenneth Seeley, estimated that the cost of Centrex features increased 400 percent for his customers. MetroNet expert Dr. Nina Cornell reported that resale customers had to pay nearly six times more for Centrex features than did medium-sized businesses (who presumably qualified for the per location volume discount). According to MetroNet, per location pricing also caused a slow but sure decline in MetroNet's profitability. It is unclear from the record whether this decline in profitability actually resulted in a net loss in 1999 and 2000. MetroNet's CEO Seeley claimed that MetroNet lost money in 1999 and 2000. However, MetroNet's bookkeeper testified that MetroNet was profitable in 1999.[10] The ***995** bookkeeper did not

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[9] We infer from the record that MetroNet passed the increased cost of Centrex features on to its customers.

[10] In its reply brief, MetroNet misconstrues the bookkeeper's testimony. The bookkeeper testified that in 1999 MetroNet experienced billing differences of $503,426 between what it paid Qwest for Centrex and what it earned from resale. MetroNet claims that the $503,426 was a net loss to MetroNet. In other words, MetroNet claims that it paid $503,426 more to Qwest for Centrex than it earned through resale. It is clear from the transcript of the bookkeeper's deposition, however, that the $503,426 billing difference was a surplus, not a net loss. In 1999, MetroNet resold Centrex for $503,426 more than it paid Qwest. The bookkeeper's testimony is unambiguous, and thus there is a direct conflict between his testimony and that of MetroNet CEO Seeley.

address overall profitability in 2000, but testified that for the first nine months of that year, MetroNet's revenues from the resale of Centrex exceeded MetroNet's cost of purchasing Centrex from Qwest.

Qwest contends that the number of Centrex telephone lines resold by MetroNet continued to grow for a year after the adoption of per location pricing, and that this fact demonstrates that MetroNet did not suffer any harm from per location pricing. Qwest also contends that any decline in MetroNet's profitability was due not to per location pricing, but rather to the entry of new competitors after passage of the Telecommunications Act of 1996, the precipitous drop in 1FB rates imposed by the WUTC in 1998, the advent of competing modes of access such as T-1 [11] and DSL[12] and heavy personnel turnover at MetroNet. Qwest also contends that regulation by the WUTC and the requirements of the Telecommunications Act of 1996 prevent it from controlling prices and excluding resellers such as MetroNet.

THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151 et seq. ("1996 Act"), mandates a fundamental restructuring of the local telephone markets in all 50 states, including Washington. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371,

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[11] T-1 line is a dedicated phone connection supporting high speed data transmission. Each line "actually consists of 24 individual channels, each of which supports 64Kbits per second. Each 64Kbit/second channel can be configured to carry voice or data traffic. Most telephone companies allow you to buy just some of these individual channels, known as *fractional T-1* access. T-1 lines are a popular leased line option for businesses connecting to the Internet...." Webopedia, *T-1 carrier, at* http://www.-webopedia.com/TERM/T/T—1--carrier.html.

[12] "DSL" stands for "digital subscriber lines." DSL technology allows data to be transmitted over existing copper telephone lines at very high speeds, and thereby greatly facilitates use of the Internet. Webopedia, *xDSL, at* http://www.webopedia.com/TERM/x/xDSL.html.

119 S. Ct. 721, 142 L.Ed.2d 835 (1999). Prior to passage of the 1996 Act, local exchange carriers ("LECs") like Qwest held exclusive state-granted franchises in their respective local telephone markets. Id. Thus, Qwest had a 100 percent share in the market for local telephone services in its 14-state region, including Washington. The 1996 Act formally abolished these exclusive franchises by prohibiting states from enforcing laws that impede competition and by imposing a host of duties on incumbent local exchange carriers ("ILECs") such as Qwest. 47 U.S.C. §§ 251, 253.

Most importantly, the 1996 Act imposed a duty on ILECs to share their networks with new local telephone providers, known as competitive local exchange carriers ("CLECs"). *Id.* § 251(c). "Under this provision, a requesting [CLEC] can obtain access to an [ILEC's] network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the [ILEC's] network 'on an unbundled basis'; and it can interconnect its own facilities ***996** with the [ILEC's] network." *AT&T Corp.*, 525 U.S. at 371, 119 S.Ct. 721; 47 U.S.C. § 251(c)(2-4). Both interconnection and unbundled access must be provided "at any technically feasible point" in the carrier's network, and on "rates, terms and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(2- 3). ILECs may not impose unreasonable conditions or limitations on the resale of telecommunications services to CLECs. *Id.* § 251(c)(4).[13]

When a CLEC seeks access to an ILEC's network through any of the three routes described above, the incumbent can negotiate an agreement without regard to the duties imposed by § 251. *Id.* § 252(a)(1); *see also AT&T Corp.*,

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[13] However, "a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers." *Id.* § 251(c)(4)(B).

525 U.S. at 372-73, 119 S.Ct. 721. However, if negotiations break down, either party may petition the relevant state commission—in this case the WUTC—to arbitrate the dispute, and the state commission must ensure that any resolution meets the requirements of § 251 and its implementing regulations. *See* 47 U.S.C. § 252(b)(1) & (c); *see also AT&T Corp.*, 525 U.S. at 373, 119 S.Ct. 721. The 1996 Act charged the Federal Communications Commission ("FCC") with issuing implementing regulations, but left the determination of rates in the hands of state commissions such as the WUTC, subject to the broad pricing standards set forth in the 1996 Act. *See* 47 U.S.C. §§ 251(d), 252(d).

NEW ENTRANTS

The parties do not dispute the terms of the 1996 Act—only its practical effect on the market for small business local phone services in Seattle/Tacoma. It is undisputed that since passage of the 1996 Act, Qwest's market share has declined by 4.2 percent, from 100 to 95.8 percent. Relying solely on MetroNet's draft marketing plan for 2000, Qwest argues that the 1996 Act has ushered in an era of significant and effective competition. The draft report, prepared by sales manager Robert Beckett and quality assurance manager Brian Tatman, stated that "MetroNet ... has seen the number of competitive providers go from solely U S West to over 17 in the past three years.... The flood of competition has produced a never ending push for customers to switch services to a new provider." "MetroNet has lost an average of 220 lines per month, with a total loss of 5721 since January 1998." According to the draft report, 86 percent of the losses went to Qwest affiliates, 14 percent to CLECs.

MetroNet disputes the validity of the statements made in the report. MetroNet cites Tatman's deposition testimony that the draft marketing plan was hastily prepared, based on few hard facts, and never finalized. MetroNet also cites the testimony of Gregory Bogus, its chief operating officer, who stated that the increase in competition after passage of the

1996 Act was confined mainly to the large business telephone market—not the small business market in which MetroNet competes—and that the effect on MetroNet was marginal.

MetroNet contends that the requirements set forth in the 1996 Act and its implementing regulations have not yet become a reality in the state of Washington. MetroNet points out that the 4.2 percent market share of Qwest's competitors is hardly evidence of robust competition. No single competitor has more than one percent of the market for small business local telephone services. In addition, MetroNet's ***997** experts claim that various circumstances have kept the central provisions of the 1996 Act from coming to fruition. MetroNet expert Cornell claims that litigation over implementation of the 1996 Act has created a significant ongoing barrier to the realization and use of the rights granted by the act. According to MetroNet expert Kenneth Wilson, Qwest has refused to open its network to local competition on rates, terms and conditions that are just and reasonable, and has refused to provide interconnection at any technically feasible point. He further claims that Qwest has imposed limitations on the use and combination of unbundled elements. According to Wilson, the resale of Centrex is the only area in the market where Qwest faces significant competition.[14] Wilson further claims that due to Qwest's continued control of the small business local telephone services market, there is no practical alternative to purchasing 1FB or Centrex lines from Qwest, or Centrex lines from resellers like MetroNet.

NEW PRODUCTS

Qwest disputes Wilson's claim by arguing that small business customers could also obtain local telephone service

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[14] As late as October 2000, resellers continued to sell over 60,000 Centrex lines to small business customers. This constituted 31 percent of the total Centrex market (i.e. all Centrex lines sold to small, medium and large size businesses).

by purchasing T-1 lines or DSL lines instead of Centrex or 1FBs. Qwest argues that MetroNet lost customers because it did not offer these and other services. According to MetroNet's marketing manager and former sales manager, MetroNet was losing customers to competitors at least in part because it was not offering products such as DSL lines and T-1 lines. However, MetroNet claims that facility-based CLECs offering these products only serve high-density metropolitan areas and focus on large, not small, business customers.

Qwest also argues that MetroNet lost customers due to the introduction of Centrex 21 in 1997. Centrex 21 was targeted at "small to medium business customers" and was designed "to fill the product continuum gap that currently exists between Basic 1FB service and Centrex Plus." Centrex 21 bundled analog or digital line access with calling features such as call waiting, caller ID and call forwarding. Instead of the Centrex Plus minimum of 21 lines per location, Centrex 21 had a 3 lines per location minimum, up to 50 lines total. Thus, Centrex 21 offered small business customers direct discounts on what was essentially a non-per location basis.

REGULATION BY THE WUTC

As a provider of telecommunications services in the state of Washington, Qwest is subject to regulation by the WUTC. The WUTC is authorized to regulate in the public interest the rates, services, facilities and practices of Qwest and other telecommunications companies. Wash. Rev. Code § 80.01.040(3). Qwest's rates must be "fair, just, reasonable and sufficient," and its service must be "rendered and performed in a prompt, expeditious and efficient manner." *Id.* § 80.36.080.

Qwest must file its tariff schedules with the WUTC, and is prohibited from changing a tariff unless it gives 30 days notice to the WUTC and the public. The WUTC can suspend the proposed changes within the 30 day period, or at any time before they are due to go into effect. *Id.* § 80.36.110(1).

Qwest may file a tariff that decreases any rate with 10 days notice without receiving a special order from the WUTC, if the filing does not contain a compensating increase in any rate and if the company agrees for a period of one ***998** year not to seek an increase in any rate to recover for revenue lost as a result of the decrease. *Id.* § 80.36.110(2).

The WUTC may on its own initiative or upon complaint hold a hearing to determine whether the rates being charged are "unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of law," or "are insufficient to yield reasonable compensation for the service rendered." *Id.* §§ 34.05.413, 80.36.140. If the WUTC finds in the affirmative, it may impose just and reasonable rates. *Id.* § 80.36.140.

The WUTC has the power to classify a telecommunications company's services as competitive if the service is subject to effective competition. The prices for competitive services must cover their costs. The WUTC does not have the power to investigate prices for competitive services on its own motion, but it may investigate them upon complaint. *Id.* § 80.36.330(4). Changes in the price of competitive services can become effective 10 days after the list is submitted to the WUTC. *Id.* § 80.36.330(2).

The prices Qwest charges for 1FB lines and for the access component of Centrex are regulated by the WUTC. The price of the features component of Centrex, however, is not, because the WUTC has deemed features a competitive service. MetroNet contends that Qwest exercises effective control over the price for Centrex access despite WUTC regulation, and that Qwest has the ability to exclude competitors such as MetroNet. MetroNet's expert Cornell claims that Qwest effectively has wide latitude in pricing the access component of Centrex because of the WUTC's limited statutory authority, its limited resources and the constraints of the regulatory process. She contends that the WUTC's inability to suspend a proposed price decrease unless that decrease is

also accompanied by an offsetting price increase means that Qwest can decrease the price of Centrex access at will. In addition, Qwest can effectively raise the price of access by raising the price of the bundled but unregulated features component.

THE DROP IN 1FB RATES

Prior to February 1998, the regulated price of a 1FB line was much greater than the regulated price of a volume discounted Centrex line. It is this disparity in rates that created the business opportunity for resellers like MetroNet. However, in February 1998, the WUTC ordered Qwest to reduce its rates for 1FB lines by more than 31 percent (from $38.10 to $28.60). Shortly thereafter, Qwest also lowered the rate for Centrex access. MetroNet's Marketing Plan 2000 described these rate reductions as the "greatest blow" suffered by MetroNet. According to MetroNet sales manager Beckett, the drop in 1FB rates was a much more significant blow to MetroNet's business than was the entry of competitors. After the sharp reduction in 1FB rates, the number of Centrex lines resold by MetroNet began to decline and the entire sales department resigned.

THE SETTLEMENT AGREEMENT

Because MetroNet appeals the district court's denial of MetroNet's motion to enforce its purported settlement agreement with Qwest, we set out the facts relevant to the ruling on MetroNet's motion. About nine months after MetroNet filed its antitrust case against Qwest, the two parties met to settle the case. The settlement meetings took place on September 26 and October 3, 2000. Qwest was represented by Lisa Anderl, its in-house counsel, and Don Taylor, the senior account manager responsible for the MetroNet account. MetroNet was represented by its Chief Operating Officer Greg Bogus and by outside counsel Brooks Harlow. After a day and a half of negotiations, the parties were ***999** still far apart on the amount of the proposed settlement.

Anderl and Harlow met separately on the afternoon of October 3 and agreed to seek approval from their respective principals for a settlement in the amount of $2.55 million. Harlow called Anderl later that day stating that he had authority from MetroNet to settle for that amount. Anderl informed him on October 3 or 4 that she also had authority to settle for $2.55 million. Over the next two days, Anderl and Harlow exchanged several drafts of the proposed settlement agreement. Harlow claims that he and Anderl agreed on the final wording of the agreement late on October 5th, and that Anderl told him she had received the necessary approvals from various vice presidents at Qwest. According to Harlow, he and Anderl represented to each other that they had all necessary authority and would be able to obtain signatures on Friday morning, October 6th.

When Harlow called Anderl on Friday morning, however, Anderl informed him she was uncertain she could get the necessary signatures from Qwest. Anderl reiterated this uncertainty on October 9th, and on October 10th she informed Harlow that Qwest's general counsel had decided not to settle the case.

Harlow claims that in his prior negotiations with Anderl over other litigation matters and business agreements, Anderl had either acted on her own authority or had made a deal after speaking with an officer of U S West. Qwest claims that following its merger with U S West on June 30, 2000, it implemented a new policy for Qwest and its subsidiaries designating certain officers as the sole authorized signatories able to bind the company or a subsidiary. According to Qwest General Counsel Tempest, "[a]t no time did any of the designated signatories authorized to bind the Qwest Corporation approve the purported settlement agreement [between Qwest and MetroNet]."

PROCEDURAL HISTORY

MetroNet filed suit against Qwest on January 5, 2000, seeking money damages and injunctive relief for alleged vio-

lations of Section 2 of the Sherman Act.[15] MetroNet asserted three causes of action under Section 2. First, MetroNet claimed Qwest maintained a monopoly over the market for small business local phone services in the Seattle/Tacoma area. Second, MetroNet claimed Qwest attempted to monopolize that market. Third, MetroNet claimed Qwest denied MetroNet access to an essential facility.

On September 26 and October 3, 2000, MetroNet and Qwest met to attempt to settle the case. Qwest withdrew from the proposed settlement agreement on October 10, 2000, and two days later MetroNet moved for an order enforcing the settlement agreement. The district court denied the motion on October 20, 2000, and denied MetroNet's motion to reconsider on November 13, 2000.

Qwest moved for summary judgment on February 13, 2001, and the district court granted Qwest's motion in its entirety on April 16, 2001. MetroNet now appeals the grant of summary judgment and the denial of its motion to enforce the settlement agreement.[16]

[*1000] ANALYSIS

I. Federal Antitrust Claims

A. Standard of Review

We review de novo a district court's grant of summary judgment. *Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc). We must determine, viewing the evi-

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[15] MetroNet also asserted a state law cause of action for breach of contract and the implied covenant of good faith and fair dealing. This cause of action was dismissed without prejudice by the district court on May 2, 2000.

[16] In its opening and reply briefs on appeal, MetroNet has neither challenged, nor even mentioned, the district court's grant of summary judgment against MetroNet on its attempted monopolization claim. As a result, MetroNet has waived this issue on appeal. *See Paracor Fin. Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1168 (9th Cir. 1996) (holding that issues not raised and argued in a party's opening brief are waived).

dence in the light most favorable to the nonmoving party, whether there exist any genuine issues of material fact and whether the district court correctly applied the substantive law. *Id.* We may not weigh the evidence or determine the truth of the matter; rather, we may determine only whether there is a genuine issue for trial. *Id.* at 1054.

Although we have noted a number of times in the past that "[s]ummary judgment is disfavored in antitrust cases," *High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 989 (9th Cir. 1993), such disfavor is limited to "complex antitrust litigation where motive and intent are important, proof is largely in the hands of the alleged conspirators, and relevant information is controlled by hostile witnesses." *Toscano v. Prof'l Golfers Ass'n*, 258 F.3d 978, 982 (9th Cir. 2001).[17] As the district court rightly concluded, this is not such a case. We therefore decline to place a thumb on the scale against granting summary judgment.

B. Implied Immunity

Qwest contends for the first time on appeal that the 1996 Act preempts MetroNet's antitrust claims. Ordinarily, we will not consider legal theories made for the first time on ap-

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[17] Although some of our cases, such as *High Tech. Careers*, may appear to stand for the proposition that summary judgment is disfavored in all antitrust cases, we have never expressly held that the disfavor extends beyond cases in which motive and intent are centrally in issue. Our oft repeated statement that "[s]ummary judgment is disfavored in antitrust cases" can always be traced back to the Supreme Court's statement in *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Id.* at 473, 82 S.Ct. 486. In *High Tech. Careers*, for example, we cited *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168 (9th Cir. 1988), for the proposition that "[s]ummary judgment is disfavored in antitrust cases." *High Tech. Careers*, 996 F.2d at 989. *Christofferson* relied on *Dimidovich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), *see Christofferson*, 849 F.2d at 1171, which in turn relied on *Poller*. *See Dimidovich*, 803 F.2d at 1477.

peal. *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1141 (9th Cir. 2001). Subject matter jurisdiction, however, is not waivable and therefore may be challenged at any time. *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1163-64 (9th Cir. 2002). The question thus arises whether implied immunity is jurisdictional in nature or whether it is better understood as an affirmative defense subject to waiver. The parties have not briefed this issue and we need not decide it: Qwest's implied immunity argument fails regardless of whether implied immunity is jurisdictional or an affirmative defense.

The Second Circuit recently held that implied antitrust immunity is an affirmative defense subject to waiver and as such "does not affect the court's subject matter jurisdiction over the action." *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134, 150 (2d Cir. 2003). If that view of implied immunity is correct, then Qwest has waived its implied immunity argument.

The Supreme Court, however, has suggested that implied immunity deprives a ***1001** court of subject matter jurisdiction because it vests exclusive preliminary jurisdiction in the relevant regulatory agency. *See, e.g., United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 485, 52 S.Ct. 247, 76 L.Ed. 408 (1932) (holding that the Shipping Act supersedes the antitrust laws and vests the Shipping Board with "exclusive preliminary jurisdiction"); *see also United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 734-35, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975) ("[W]e have implied immunity in particular and discrete instances to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts *exercising jurisdiction under the antitrust laws.*") (emphasis added). On this view, the issue of implied immunity has not been waived and is properly before us.

Even if we assume *arguendo* that Qwest's implied immunity argument has not been waived, it fails nonetheless. Qwest relies on *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), in which the court held that "[t]he 1996 Act is ... more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field." *Id.* at 401.[18] Two other circuit courts have expressly disagreed with *Goldwasser,* concluding that the 1996 Act did not confer implied immunity from suit under the antitrust laws. *See Law Offices of Curtis V. Trinko v. Bell Atl. Corp.,* 305 F.3d 89, 109-13 (2d Cir. 2002) (as amended), *cert. granted in part sub nom. Verizon Communications Inc. v. Law Offices of Curtis v. Trinko,* --- U.S. ---, 123 S.Ct. 1480, 155 L.Ed.2d 224 (2003); *Covad Communications Co. v. BellSouth Corp.,* 299 F.3d 1272, 1280-82 (11th Cir. 2002). We agree with the Second and Eleventh Circuits that the 1996 Act did not impliedly immunize Qwest from antitrust liability.

The Supreme Court has repeatedly noted that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986) (internal quotation marks and citations omitted). The plain language of the statute reveals that Congress intended the 1996 Act to coexist with, rather than preempt, the antitrust laws. "Congress explicitly stated—both through a savings clause directed specifically at antitrust enforcement and through an additional general savings clause—that the 1996

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[18] The *Goldwasser* court stated that "Our principal holding is ... not that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust law. Such a conclusion would be troublesome at best given the antitrust savings clause in the statute." *Id.* at 401. However, the court *in effect* held that defendants are impliedly immune from suit under the antitrust laws when the challenged conduct is also covered by the 1996 Act. *Id.*

Act does not supplant or change the antitrust laws." *Covad Communications Co.*, 299 F.3d at 1280. The 1996 Act provides:

> ANTITRUST LAWS ... SAVINGS CLAUSE ... [N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws....
>
> FEDERAL STATE AND LOCAL LAW ... NO IMPLIED EFFECT ... This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or Amendments.

***1002** Telecommunications Act of 1996, § § 601(b)(1), (c)(1), 110 Stat. 56, 143 (1996), *codified at* 47 U.S.C. § 152, Historical and Statutory Notes. In light of this express language, we conclude that no "plain repugnancy" exists between the 1996 Act and the antitrust laws. *Law Offices of Curtis V. Trinko,* 305 F.3d at 109. ("The savings clause unambiguously establishes that there is no 'plain repugnancy' between the Telecommunications Act and the antitrust statutes [and thus] that the Telecommunications Act does not provide an 'implicit immunity' from the antitrust laws."); *Covad Communications Co.*, 299 F.3d at 1281 (same).[19]

Even absent the explicit language of the savings clauses, Qwest would not be entitled to implied immunity for its im-

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[19] Like the Eleventh Circuit, we conclude "that the plain statutory language is sufficient to end our inquiry on this matter." *Covad Communications Co.*, 299 F.3d at 1281. We also agree with the Eleventh Circuit that "should there be any doubt that the plain language of the savings clause resolves the issue, we find support for our conclusion in the legislative history surrounding the 1996 Act, reflecting that the President, the Congress, the Department of Justice, and the FCC have emphasized the critical need for the antitrust laws to work in conjunction with the 1996 Act in order to spur competition in the telecommunications industry." *Id.*

position of per location pricing. "Pervasive regulation of an industry alone is insufficient to confer blanket immunity on every action taken within the industry." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1056 (9th Cir. 1983) (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-75, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973)).[20] Although we have recognized a limited class of cases in which a regulatory mandate to engage in anticompetitive conduct may confer implied antitrust immunity, no such mandate exists here. *Id.* at 1057. The 1997 switch from system pricing to per location pricing for Centrex features was freely undertaken by Qwest in an effort to eliminate resale. Where the conduct challenged under the antitrust laws "is the product of the regulated business' independent initiative and choice, [that conduct] is properly subject to antitrust scrutiny." *Id.* Thus, Qwest's imposition of per location pricing is not conduct entitled to implied immunity.

C. Discussion

MetroNet contends that the district court overlooked genuine disputes of material fact in ruling that Qwest neither maintained a monopoly nor excluded MetroNet from an essential facility in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. We consider each claim in turn.

1. The Monopolization Claim

Section 2 of the Sherman Act makes it illegal for a person to "monopolize ... any part of the trade or commerce among the several States." 15 U.S.C. § 2. Any person "injured in his business or property" by such monopolization may bring suit for treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15(a). In order to prevail on its

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[20] A regulatory mandate sufficient to confer implied antitrust immunity may in some cases exist where there is explicit congressional approval of the challenged conduct and its ultimate anticompetitive effect, and there is no inconsistency or 'plain repugnancy' between the conduct and the express policies of the regulating body." *Northrop*, 705 F.2d at 1057.

monopolization claim, MetroNet must prove that Qwest (1) possessed monopoly power in the relevant market, (2) willfully acquired or maintained that power through exclusionary conduct and (3) caused antitrust injury. *See* ***1003** *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Janovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1151 (9th Cir. 1997). The district court erroneously concluded on summary judgment that MetroNet could not establish any of these elements.

Monopoly power: Monopoly power, commonly referred to as market power, is defined as " 'the power to control prices or exclude competition.' " *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)). "Market power can be proven by either direct or circumstantial evidence." *Id.* Because direct evidence of the power to control prices or exclude competitors is rarely available, courts generally rely on circumstantial evidence of market power. *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001). In order to establish Qwest's market power by circumstantial evidence, MetroNet must "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and ... that existing competitors lack the capacity to increase their output in the short run." *Rebel Oil, Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995).

Here, the relevant market is not in dispute. The parties have defined it as the market for small business local telephone services in the Seattle/Tacoma area. Thus we turn directly to the issue of Qwest's market share. The principal competing products in the market are Qwest's 1FB service and the resellers' Centrex service purchased from Qwest and resold to small business users.[21]

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[21] The market also includes T-1 and DSL lines sold to small businesses, though the parties dispute the extent to which these products pro-

The district court concluded that even though Qwest's market share exceeds 95 percent, "it is highly unlikely that Qwest's high market share confers upon it monopoly power." The court reasoned that the 1996 Act had already removed many of the barriers to entry, and any remaining barriers "will diminish in time as new firms build their infrastructure, gain a toehold in the market, advertise more widely, and gain wider recognition." On these assumptions, the court predicted that "a 95 [percent] market share now could well evaporate in the coming years without antitrust involvement."

The district court was equally dismissive of MetroNet's claim that Qwest could control prices. The court reasoned first that "phone service is not the type of commodity that is susceptible to price increase through output reduction." The court also reasoned that competition in the wake of the 1996 Act would limit Qwest's ability to control prices for calling features, and that regulation by the WUTC "mitigates the extent to which Qwest can simply dictate prices for access to phone service."

The district court was correct to focus its attention on Qwest's ability to exclude competition and control prices, rather than simply on market share. In general, a plaintiff may establish a prima facie case of market power by showing that the defendant has a 65 percent or greater market share. *Image Tech.*, 125 F.3d at 1206 (citing *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946)). However, in cases involving regulated industries, "[r]eliance on statistical market share ... is downright folly where, as here, the predominant market share is the result of ***1004** regulation." *Metro Mobile CTS, Inc. v. NewVector Communications, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989); *see also S. Pac. Communications Co. v. AT&T*, 740

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vide small businesses with viable alternatives to 1FB and Centrex lines. The market does not encompass Qwest's sales of Centrex directly to end-users because those end users are large, not small, businesses.

F.2d 980, 1000 (D.C.Cir. 1984) ("Reliance on statistical market share is a questionable approach in cases involving regulated industries.... A predominant market share may merely be the result of regulation, and regulatory control may preclude the exercise of monopoly power."). We have held that "[i]n such cases, the court should focus directly on the regulated firm's ability to control prices or exclude competition." *Metro Mobile*, 892 F.2d at 63; *see also S. Pac. Communications Co.*, 740 F.2d at 1000 (holding that "in such cases market share should be at most a point of departure in determining whether monopoly power exists. Ultimately, a court should focus directly upon the ability of the regulated firm to control prices or exclude competition.").

Although the focus of the district court's inquiry was correct, the court nonetheless improperly weighed evidence and failed to view the facts in the light most favorable to MetroNet. The court should not have substituted its own speculations about present and future barriers to entry for the evidence in the record. MetroNet's expert Cornell stated in her declaration that there are at least three structural barriers to entry that give Qwest a high degree of market power: (1) each end user of telephone services must be physically connected to a local exchange switch, which makes it prohibitively expensive to build a telephone network from scratch; (2) because Qwest owns the only comprehensive local exchange network, both facilities-based providers and resellers need a high degree of cooperation from Qwest in order to access that network; and (3) Qwest's historical monopoly has created enormous economies of scale that discourage competition and give Qwest an incentive not to cooperate.

The district court concluded, based presumably on MetroNet's year 2000 draft marketing report, that "MetroNet's expert overstates the case for high entry barriers in this market." The draft marketing report, which was prepared by sales manager Beckett and quality assurance manager Tatman, stated that "MetroNet ... has seen the number of competitive providers go from solely U S West to over 17 in[the]

past three years.... The flood of competition has produced a never ending push for customers to switch services to a new provider." However, the validity of these statements is contested. Tatman testified on deposition that the draft marketing plan was hastily prepared, based on few hard facts and never finalized. MetroNet COO Bogus testified that the increase in competition after passage of the 1996 Act was confined mainly to the large business telephone market and that the effect on MetroNet was "marginal." The district court improperly treated the statements in the draft marketing report as though they were undisputed by MetroNet.

Qwest argues that the statements in the draft marketing report are sufficient to "render MetroNet's expert reports to the contrary unreasonable and preclude MetroNet (and Amicus) from arguing that those reports raise a factual dispute." The district court's disregard for the testimony of MetroNet's experts seems premised on the same argument. We have recognized that "expert opinion ... may defeat summary judgment if it appears that the affiant is competent to give an expert opinion and that the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not." *Rebel Oil*, 51 F.3d at 1435. However, "the inference to be drawn from expert affidavits must ... be sufficient to support a favorable jury verdict." *Id.* " 'When an expert opinion is not supported by sufficient ***1005** facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.' " *Id.* at 1436 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993). Thus, in antitrust cases, inferences drawn from expert opinions must be economically reasonable in light of "undisputed facts about the structure of the market." *Id.* at 1435-36. There is no basis in the record for concluding that the testimony of MetroNet's experts fails to meet the standard articulated in *Rebel Oil*. It was improper for the district court to

disregard the opinions of MetroNet's experts without providing a reasoned analysis of how their opinions failed to satisfy the *Rebel Oil* standard.

The court also erred in concluding that Qwest could not control price due to competition in the market for features and WUTC regulation of the price of Centrex access. The court inferred from MetroNet's year 2000 draft marketing report that at least 17 competitors had entered the local small business telephone services market in Seattle/Tacoma. As we point out above, however, the draft marketing report cannot be accepted as undisputed evidence. MetroNet has raised a triable issue of fact as to the number and extent of new entrants.

Even if the draft marketing report were accepted as true, "[t]he fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers." *Rebel Oil*, 51 F.3d at 1440. We have previously concluded on several occasions that monopoly power exists despite the presence of new entrants. *Id.* at 1441 (holding, on appeal from summary judgment, that a juror could reasonably conclude that the entry of two gas stations into the Las Vegas retail gasoline market would be insufficient to offset supracompetitive prices); *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 367 (9th Cir. 1988) (holding, on appeal of a motion for judgment notwithstanding the verdict, that the entry of two rivals did not preclude the jury's finding of monopoly power); *Pac. Coast Agric. Exp. Assoc. v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1204 (9th Cir. 1975) (holding that Sunkist had monopoly power over the Hong Kong export market for Arizona-and California-grown oranges, where its competitors "were relatively small, with no single competitor controlling over ... 12% of the market after [ ] Sunkist's entry."). In the present case, recent entrants collectively account for less than five percent of the market, and no single entrant has more than a one percent share. Qwest asks us to infer from this anemic market share that the opinions of MetroNet's experts on barriers to entry are unreasonable. We

decline to do so. There is no evidence that these entrants will continue to wrest market share from Qwest.

In concluding that the WUTC could effectively constrain Qwest's ability to control the price of telephone access, the district court failed to consider the realities of Washington's regulatory scheme. *See S. Pac. Communications,* 740 F.2d at 1001 (setting aside the district court's conclusion on summary judgment that AT & T lacked monopoly power because the district court "fail[ed] to consider the realities of the regulatory scheme.... The regulatory agencies are not always able to respond to the alleged abuses immediately and effectively."). MetroNet proffered evidence that the WUTC's limited statutory authority, limited resources and the constraints of the regulatory process effectively left Qwest with considerable latitude in setting the price for Centrex access. MetroNet also proffered evidence that for the last 15 years Qwest has been able to evade the WUTC's instructions to unbundle Centrex access from Centrex features.

***1006** The key question is whether existing competitors and immediate potential entrants have sufficient capacity to take business away from the incumbent monopolist and thereby constrain the incumbent's ability to raise prices above competitive levels. *See Rebel Oil,* 51 F.3d at 1440-41; *see also Microsoft,* 253 F.3d at 51. MetroNet has proffered sufficient evidence on the continuing barriers to entry to create a triable issue of fact as to the ability of new and existing entrants to constrain Qwest's market power.

Exclusionary conduct: The mere existence of monopoly power does not constitute illegal monopolization under Section 2 of the Sherman Act. A plaintiff must also establish that the defendant acquired or maintained the monopoly by engaging in exclusionary conduct "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell,* 384 U.S. at 571, 86 S.Ct. 1698. "[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive

effect.' That is, it must harm the competitive *process* and thereby harm consumers.... [H]arm to one or more *competitors* will not suffice." *Microsoft*, 253 F.3d at 58 (emphasis in original). This focus on an anticompetitive effect is essential, because "it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition." *Rebel Oil*, 51 F.3d at 1433. Thus, courts must seek to distinguish between exclusionary conduct that harms consumer welfare and legitimate competitive acts that enhance it. *Microsoft*, 253 F.3d at 58. We have held that "[c]onsumer welfare is maximized when economic resources are allocated to their best use .... and when consumers are assured competitive price and quality." *Rebel Oil*, 51 F.3d at 1433. "[A]n act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality." *Id.* (emphasis in original).

In assessing whether Qwest's imposition of per location pricing has harmed consumer welfare, we are mindful that the antitrust laws protect competition, not particular competitors. We do not suggest that a provider of services must maintain in existence middlemen who deliver no economic value to consumers. MetroNet's allegation, rather, is that resellers enhance consumer welfare by providing small business consumers with lower-price telecommunications services, and that Qwest is seeking to eliminate this contribution to consumer welfare through per location pricing.

The district court concluded that MetroNet could not establish harm to consumer welfare because market competition prevented Qwest from raising the overall price for Centrex above competitive levels. The court reached this conclusion based on evidence that the overall price of Centrex to consumers dropped significantly. Qwest argues similarly on appeal that the decline in the overall price of Centrex precludes a finding that Qwest raised prices above competitive levels.

We must determine whether MetroNet has created a triable issue of fact as to whether per location pricing harmed consumer welfare. Both the district court and Qwest erroneously focus on the overall price of Centrex.[22] It is undisputed that ***1007** when Qwest instituted per location pricing the price of Centrex features for customers with fewer than 21 lines went up approximately 400 percent, and that it was almost six times greater than the price charged to medium and large businesses. This is prima facie evidence of pricing above competitive levels.

MetroNet also proffered evidence that the elimination of resellers would harm allocative efficiency. According to Cornell, resale performs the beneficial function of "forc[ing] the firm whose services are being resold to limit volume discounts to levels that are cost-based. Without resale, the firm might be able to offer volume discounts that were greater than the costs saved and recover the lost revenues from smaller users." MetroNet contends, and Qwest has not denied, that there is no cost-based or volume-based justification for per location pricing. Courts have recognized that discount resellers such as MetroNet can play an important role in creating and maintaining a competitive marketplace and have held that attempts to eliminate discounters violate the antitrust laws. *Cf. United States v. Gen. Motors Corp.*, 384

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[22] That Qwest requires customers to purchase access and features together does not in turn require that we look at the bundled, rather than the unbundled, price of Centrex components in assessing harm to consumer welfare. Even if the fall in the price of access more than offset a rise in the price of features, thereby causing the overall price of Centrex to fall, Qwest could still be held liable for anticompetitive pricing on the features component. The question is whether the price of features, and therefore Centrex overall, would be *even lower* were it not for per location pricing. Qwest asserts that its pricing of calling features does not raise antitrust concerns because the pricing of features is unregulated. The mere fact that the price of features is unregulated, however, does not negate the undisputed evidence that Qwest's imposition of per location pricing raised the price of features far above cost for small business customers.

U.S. 127, 146-47, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966) (holding that a conspiracy among GM, automobile dealers and their association to deprive franchised dealers of the freedom to sell through discounters was unlawful conspiracy in restraint of trade under Section 1 of the Sherman Act); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 935-37 (7th Cir. 2000) (upholding an FTC decision that a conspiracy between Toys "R" Us and toy manufacturers to restrict manufacturers' sales to low price warehouse club stores violated the antitrust laws).

There would be no harm to consumer welfare if customers could switch to a virtually identical product costing the same or less than Centrex without per location pricing. Thus, if customers could purchase 1FB lines and features for approximately the same price they would pay for Centrex access and features without per location pricing, MetroNet would have no claim. But the record suggests the contrary: the price of 1FB lines *without features* remained significantly above the price of Centrex, even after the WUTC-imposed drop in the price of 1FB lines in February 1998. The record suggests that small business consumers had little or no economically equivalent alternative but to continue purchasing Centrex access and features from resellers such as MetroNet. If true, the increase in the price of Centrex features above competitive levels harmed consumers.[23]

Given that MetroNet has successfully made out a prima facie case of exclusionary conduct by demonstrating anticompetitive effect, the burden shifts to Qwest to offer a procompetitive justification for per location pricing. *See Microsoft,* 253 F.3d at 59.

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[23] The lack of an effective substitute is also borne out by the fact that as late as October 2000, resellers continued to sell more than 60,000 Centrex lines to small business customers. This constituted 31 percent of the total Centrex market (i.e. all Centrex lines sold to small, medium and large businesses).

If the monopolist asserts a procompetitive justification—a nonpretextual claim ***1008** that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim.... [I]f the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.

Id. Qwest has not asserted any procompetitive justification for per location pricing. It is undisputed that per location pricing has no cost-based justification, *compare Oahu Gas,* 838 F.2d at 368 (economic necessity justified allegedly exclusionary conduct), and Qwest has not suggested how per location pricing enhances efficiency or improves the products offered to consumers, *see Microsoft,* 253 F.3d at 59.[24] Therefore, MetroNet has proffered sufficient evidence to establish exclusionary conduct on the part of Qwest.

Antitrust injury: A private party seeking damages under Section 2 must also establish that the defendant caused it anti-trust injury. Based on its determination that MetroNet failed to raise a triable issue of fact as to Qwest's alleged monopoly power or exclusionary conduct, the district court summarily concluded that MetroNet could not establish that it suffered an antitrust injury. Because we have reached the opposite conclusion with respect to Qwest's alleged monopoly power and exclusionary conduct, we address the merits of the antitrust injury requirement.

To satisfy this requirement, the plaintiff must show (1) that it suffered an injury in fact, (2) that the injury was caused by an antitrust violation and (3) that the injury was of

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[24] It is also undisputed that Qwest imposed per location pricing in order to eliminate the resale market for Centrex Plus. However, we note that evidence of intent behind Qwest's conduct is relevant only to the extent that it helps us understand the likely effect of Qwest's conduct. *Microsoft,* 253 F.3d at 59.

the type the antitrust laws were intended to prevent. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); *see also Rebel Oil,* 51 F.3d at 1433. Qwest contends that MetroNet has failed to establish any of these elements. We consider each of them in turn.

First, Qwest argues that MetroNet has failed to establish that it suffered injury in fact. MetroNet's CEO Seeley claims MetroNet began losing money in 1997 and suffered a net loss in 1999 and 2000. However, MetroNet's bookkeeper testified on deposition that MetroNet was profitable in 1999. Although the evidence of the financial harm to MetroNet is weak, it is sufficient to withstand summary judgment. Even if MetroNet remained profitable in 1999, the testimony of its CEO indicates an increasing loss of revenue and profits. A showing of harm under Section 2 of the Sherman Act does not require that the plaintiff go bankrupt or experience a net loss. A decline in anticipated profits will suffice. *See, e.g., Blanton v. Mobil Oil Corp.,* 721 F.2d 1207, 1215 (9th Cir. 1983) ("To establish causal antitrust injury, 'the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and *some loss of anticipated revenue.*' " (emphasis added)); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) ("[The plaintiff's] burden of proving the fact of damage under [Section] 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the ***1009** fact of damage." (emphasis in original)). Furthermore, "[w]here, as here, defendants have acted with intent to eliminate competition, the proof of resulting injury need not be overwhelming." *D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982); *see also Fox West Coast Theatres Corp. v. Paradise Theatre Bldg. Corp.,* 264 F.2d 602, 608 (9th Cir. 1958) ("[The fact of] damage need not be made patent item by item as on a

balance sheet. The mere unlawful combination over a period of time to eliminate competition is proof of damage.").

Second, Qwest contends that even if MetroNet has established injury in fact, it has not established causation because any decline in MetroNet's profitability was due not to per location pricing, but rather to the entry of new competitors after passage of the 1996 Act, the precipitous drop in 1FB rates imposed by the WUTC in 1998, the advent of competing modes of access such as T-1 and DSL and heavy personnel turnover at MetroNet.

To establish causation, MetroNet need only show that per location pricing was a "material cause" of MetroNet's injury. *See Zenith Radio Corp.*, 395 U.S. at 114 n. 9, 89 S.Ct. 1562 ("It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury. ..."). We have interpreted this to mean that the plaintiff must "establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue." *Blanton*, 721 F.2d at 1215 (internal quotation marks omitted). MetroNet must therefore show that "the antitrust violation contribute[d] significantly to [its] injury, even if other factors amounted in the aggregate to a more substantial cause." 2 Areeda & Hovenkamp, Antitrust Law § 338a, at 317 (2d ed.2000) (interpreting *Zenith*). However, MetroNet's claim fails as a matter of law if MetroNet would have suffered the same injury even without per location pricing. *See Brunswick Corp.*, 429 U.S. at 487-88, 97 S.Ct. 690; *see also* 2 Areeda & Hovenkamp § 338b, at 320-21 (noting that no material cause can be demonstrated where an independent cause fully accounts for the claimed antitrust injury).

The other possible causes of MetroNet's woes do not negate MetroNet's evidence that per location pricing played a material role in causing its injury. Therefore, MetroNet has

proffered sufficient evidence to create a triable issue of fact as to causation.

Finally, Qwest contends that MetroNet has failed to show that its injury is the type of injury the antitrust laws were designed to prevent, such that Qwest's conduct has harmed consumer welfare. A showing of such injury is distinct from the question of causation. *Brunswick*, 429 U.S. at 487-89, 97 S.Ct. 690 (noting that antitrust violations can cause "losses which are of no concern to the antitrust laws" and that "plaintiffs ... must prove more than injury causally linked to an illegal presence in the market").

The antitrust laws are intended to protect competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). "To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior.... If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury...." *Rebel Oil*, 51 F.3d at 1433. Where the defendant's illegal conduct harms the plaintiff without adversely affecting competition generally, we have found no antitrust injury. *See, e.g.*, ***1010** *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034-36 (9th Cir. 2001).

MetroNet's CEO Seeley claims MetroNet's financial losses flowed from Qwest's imposition of per location pricing. It appears that some customers left MetroNet at least in part because of the higher price for features, although this point is disputed, and that MetroNet increasingly found itself unable to make a profit on the customers who remained. We have already concluded that MetroNet has proffered sufficient evidence of an anticompetitive effect to establish exclusionary conduct. We further conclude that, for purposes of avoiding summary judgment, MetroNet has proffered sufficient evidence to establish that its injury flowed from the anticompetitive effects of per location pricing.

We hold that at this stage in the litigation MetroNet has adduced sufficient evidence of monopoly power, exclusionary conduct and antitrust injury to proceed with its monopolization claim.

2. The Essential Facilities Claim

"The 'essential facilities' doctrine imposes on the owner of a facility that cannot reasonably be duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors on a nondiscriminatory basis." *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 983 (9th Cir. 1988) The origin of the doctrine is generally traced to *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912), in which the Supreme Court held that the defendants, railroad companies that jointly owned all rail terminal facilities across the Mississippi at St. Louis, could not deny their competitors access to those facilities on reasonable terms because such access was essential to competition. A denial of access to an essential facility violates Section 2 because control of an essential facility can "extend monopoly power from one stage of production to another, and from one market into another." *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983).

In order to prevail on its essential facilities claim, MetroNet must prove (1) that Qwest is a monopolist in control of an essential facility, (2) that MetroNet, as Qwest's competitor, is unable reasonably or practically to duplicate the facility,[25] (3) that Qwest has refused to provide MetroNet access to the facility and (4) that it is feasible for Qwest to provide

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[25] We have "point[ed] out that the second element is effectively part of the definition of what is an essential facility in the first place. That is to say, if the facility can be reasonably or practically duplicated it is highly unlikely, even impossible, that it will be found to be essential at all." *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992).

such access.[26] *See City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992) (citing MCI Communications Corp., 708 F.2d at 1132-33). The district court found that MetroNet could not prove any of the first three elements.[27] We disagree.

Under the first element, "[a] facility that is controlled by a single firm will be considered 'essential' only if control of the facility carries with it the power to *eliminate* competition in the downstream market." ***1011** *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991). The alleged essential facility in this case is Qwest's comprehensive local exchange network. Resellers obtain access to that network through the Centrex product. Thus, the claim is that Qwest has denied resellers like MetroNet access to its network by effectively eliminating the market for Centrex resale.

The district court concluded that MetroNet could not establish Qwest's control of this facility because the 1996 Act requires Qwest to provide competitors with interconnection and with access to calling features. Responding to MetroNet's argument that Qwest's exclusionary pricing prevented MetroNet from reasonable access to Qwest's local exchange network, the district court concluded:

> Even if the per location pricing policy makes the calling features available to MetroNet and other firms on terms that make resale of those features unprofitable, there will still be competition in the market for local business phone service from wholesalers and from firms with their own facilities who

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[26] We have "pointed out that the fourth element basically raises the familiar question of whether there is a legitimate business justification for the refusal to provide the facility." *City of Anaheim*, 955 F.2d at 1380.

[27] The parties do not dispute that MetroNet can satisfy the fourth element of its essential facilities claim.

have interconnected with Qwest's physical network under the Telecom Act.

This conclusion—although perhaps plausible—is not supported by the record. MetroNet's draft marketing report and the depositions of Tatman and Beckett, when viewed in the light most favorable to MetroNet, do not support an inference of effective or sustained competition. Furthermore, MetroNet's experts Wilson and Cornell stated in their reports that Qwest did not face effective competition. Wilson stated that "there are no practical alternatives for service for small businesses other than [Qwest] provided service or service provided by Centrex resale such as that provided by MetroNet." In light of the record on summary judgment, the district court erred in assuming, to MetroNet's detriment, that the passage of the 1996 Act in fact caused Qwest to "open access to at least part of its essential facility."[28]

With respect to the second element, MetroNet must show its inability practically or reasonably to duplicate the facility. The district court concluded that MetroNet could not establish a lack of reasonable alternative means of access to Qwest's essential facility. The court found that competitors could gain access to Qwest's facility by purchasing 1FB lines and certain calling features from Qwest at wholesale prices

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[28] Pursuant to the interconnection provisions of the 1996 Act, MetroNet signed an interconnection agreement with Qwest in August 2000. MetroNet, however, has not made use of that agreement. Qwest argues on appeal that the interconnection agreement proves that Qwest lacks control over an essential facility and that even if Qwest does have such control, it has not denied access to MetroNet. MetroNet's CEO Seeley stated in his declaration, however, that "the wholesale interconnection agreement option was not a realistic option at all." According to Seeley, Qwest refused to include long-distance and voice mail services in the agreement, which meant that end users would have to move to another service provider. As a result, according to Seeley, MetroNet would lose 30 to 40 percent of its business. The mere fact that MetroNet signed an interconnection agreement does not negate MetroNet's evidence that Qwest controls an essential facility and that it denied MetroNet reasonable access to that facility.

and reselling them for a profit. The court also found that MetroNet had failed to rebut evidence that features could be purchased on the open market at competitive prices. The record does not support either conclusion.

There is no evidence that 1FB lines can be purchased at wholesale prices and resold profitably, and MetroNet, which bears the burden of proof, adduced evidence to the contrary. MetroNet expert Cornell stated: "[t]here is no evidence in this case that ... MetroNet could turn to other providers for the essential inputs to ***1012** provide services to small business users." MetroNet's CEO stated that the resale of 1FB lines is "an illusion," and that "if we resold 1FBs we would be insolvent immediately." He did not provide an explanation for these statements, but the reasonable inference on summary judgment is that the difference between the wholesale and resale prices of 1FB lines is not enough for MetroNet to make a profit through resale. This inference is supported by MetroNet expert Wilson's statement that the wholesale discount on business lines is too small to encourage competition. If 1FB lines could not be resold profitably, the question whether MetroNet could purchase features on the open market at competitive prices is not dispositive. Although MetroNet's COO Bogus testified on deposition that MetroNet could purchase voice mail from vendors other than Qwest, there is no evidence that MetroNet could do so profitably. There is also no evidence that MetroNet could purchase features from Qwest without also purchasing Centrex access.

The third element of MetroNet's essential facilities claim requires a showing that Qwest denied MetroNet access to the facility. Access need not be denied absolutely; unreasonable terms and conditions of access, such as the services provided or the rates charged, may result in practical denial of access. *See, e.g., Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544-45 (4th Cir. 1991); *Del. & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 180 (2d Cir. 1990). However, providing access at a fee that is not so high as to

drive away competition does not amount to a denial of access. *Alaska Airlines*, 948 F.2d at 545-46. *See also Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996). The district court, citing *Alaska Airlines*, correctly stated the test as follows: "Qwest would deny MetroNet access to its essential facility if it simply refuse[d] MetroNet any access to its facility, or price[d] access to that facility in a way that would 'drive [MetroNet] away.' " MetroNet does not claim that Qwest has denied it all access; rather, MetroNet claims that per location pricing had the effect of driving it out of the market.

The district court required MetroNet to show (1) that per location pricing made MetroNet's resale of Centrex unprofitable and (2) that "*any* unprofitability was caused *solely* by Qwest's pricing policy." (Emphasis added.) The first requirement is largely correct; the second overstates MetroNet's burden. As to the first requirement, it is not enough for MetroNet to show that per location pricing merely decreased its profitability; MetroNet must show that the decrease in profitability due to per location pricing was significant enough to discourage MetroNet from staying in the business. In other words, MetroNet must show that per location pricing made the Centrex resale business unprofitable, or squeezed the profit margin to the point where the game was no longer worth the candle. As to the second requirement, MetroNet need not prove that all of its financial woes were caused by per location pricing; rather, it must show that the financial harm attributable to per location pricing—apart from the financial harm due to other causes—was alone sufficient to drive it out of the market. *See Alaska Airlines,* 948 F.2d at 545-46.

MetroNet's only evidence in support of its claim that per location pricing had the effect of driving it and other resellers away is the declaration of its CEO. Seeley claims that as a direct result of per location pricing, MetroNet began to slide toward unprofitability in 1997 and was in fact unprofitable in 1999 and 2000. He further claims that several of MetroNet's

competitors left the Centrex resale business and that one competitor went bankrupt***1013** because of per location pricing. Seeley's testimony as to MetroNet's unprofitability is disputed. MetroNet's bookkeeper testified that MetroNet was profitable in 1999. Although the bookkeeper did not address MetroNet's overall profitability in 2000, he testified that for the first nine months of that year, MetroNet's revenues from the resale of Centrex exceeded MetroNet's cost of purchasing Centrex from Qwest. As we noted in our discussion of the monopolization claim, this evidence of the injury to MetroNet is weak. So too is the evidence of injury to other resellers. However, our role on summary judgment is not to weigh the evidence. We must determine simply whether the evidence, when viewed in the light most favorable to MetroNet, creates a triable issue of fact. We hold that MetroNet has met this burden with respect to whether per location pricing alone had a sufficiently adverse financial impact to drive MetroNet and other resellers away. *Id.* at 546 ("When a firm's power to exclude rivals from a facility gives the firm the power to *eliminate* competition in a market downstream from the facility, and the firm excludes at least some competitors ... a finding of monopolization, or at least attempted monopolization, is appropriate ..." (emphasis in original)). Qwest came forward with some evidence of other reasons for MetroNet's unprofitability, but this evidence is insufficient to resolve the issue in Qwest's favor on summary judgment.

We hold that at this stage in the litigation MetroNet has adduced sufficient evidence to proceed with its essential facilities claim.

II. Settlement Agreement

A. Standard of Review

The parties dispute the standard of review we should apply to the district court's denial of MetroNet's motion to enforce its purported settlement agreement with Qwest. Met-

roNet urges de novo review,[29] whereas Qwest argues for an abuse of discretion standard.[30] The arguments of both parties assume that state law should govern the choice of the standard of review. We disagree. "[T]he proper standard of review is a question of federal procedure and is governed by federal law." *West v. State Farm Fire & Cas. Co.*, 868 F.2d 348, 350 (9th Cir. 1989) (diversity breach of contract case). Although Washington's substantive law governs the interpretation of the settlement agreement, federal law governs the standard of review to be applied to the district court's decision. *Id.* We review a district court's decision whether to enforce a settlement agreement under an abuse of discretion standard. *See Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987).

MetroNet argues that an abuse of discretion standard should not apply because the material facts are not in dispute and the only issue is whether the parties manifested an intent to be bound by the settlement agreement. We have recognized a district court's inherent power to enforce a settlement agreement in a case ***1014** pending before it. *See In re City Equities Anaheim, Ltd.*, 22 F.3d 954, 957 (9th Cir. 1994). "To the extent the court's power to enforce a settlement agreement falls within the court's role as supervisor of litigation, then ... this is precisely the type of determination that normally receives a deferential, abuse of discretion review." *Wilson v. Wilson*, 46 F.3d 660, 664 (7th Cir. 1995) (citing

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[29] MetroNet cites *Lavigne v. Green*, 106 Wash.App. 12, 23 P.3d 515, 518 (2001); *Brinkerhoff v. Campbell*, 99 Wash.App. 692, 994 P.2d 911, 914 (2000); *In re Patterson*, 93 Wash.App. 579, 969 P.2d 1106, 1109 (1999); and *In re Marriage of Ferree*, 71 Wash.App. 35, 856 P.2d 706, 710-11 (1993). These cases hold that where the moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed, the standard of review should be the same as that applied in summary judgment proceedings.

[30] Qwest cites *Morris v. Maks*, 69 Wash.App. 865, 850 P.2d 1357, 1358 (1993), which in turn relied on our holding in *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987).

Pierce v. Underwood, 487 U.S. 552, 558 n.1, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988).

B. Discussion

In Washington, settlement agreements are governed by general principles of contract law. *See Morris*, 850 P.2d at 1359. In determining whether an unexecuted settlement agreement constitutes a binding contract, Washington courts consider whether (1) the subject matter has been agreed upon, (2) the terms are all stated in the agreement and (3) the parties intended a binding agreement prior to the time of signing and delivery. *Id.* (citing *Loewi v. Long*, 76 Wash. 480, 136 P. 673, 674 (1913). "If the subject-matter is not in dispute, the terms are agreed upon, and the intention of the parties plain, then a contract exists between them by virtue of the informal writings, even though they may contemplate that a more formal contract shall be subsequently executed and delivered." *Loewi*, 136 P. at 674.

MetroNet has the burden of establishing the existence of an enforceable agreement. *Johnson v. Nasi*, 50 Wash.2d 87, 309 P.2d 380, 382 (1957) ("The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention."). The district court concluded that MetroNet failed to establish the parties' intent to be bound prior to execution of the agreement. We agree.

"While the compromise of litigation is to be encouraged, negotiations toward a compromise are not binding upon the negotiators." *Eddleman v. McGhan*, 45 Wash.2d 430, 275 P.2d 729, 730 (1954). In determining whether the parties intended to be bound, we must look to the objective manifestations of their intent rather than to their subjective beliefs. As the Washington Supreme Court has stated:

> The Washington court has long adhered to the objective manifestation theory in construing the words and acts of alleged contractual parties. We impute to a person an intention corresponding to the rea-

> sonable meaning of his words and acts. Unexpressed intentions are nugatory when the problem is to ascertain the legal relations, if any, between two parties.

Plumbing Shop, Inc. v. Pitts, 67 Wash.2d 514, 408 P.2d 382, 384 (1965). We agree with the district court that "[t]he reasonable meaning of the parties' words and acts in this case was that the agreement needed to be signed for the settlement agreement to be complete and binding."

The agreement itself indicates that it was not to become legally operative until execution. First, the agreement requires Qwest to pay the settlement amount 10 days after the date of execution, implying that without execution, Qwest had no obligation to pay. ("Qwest shall pay to MetroNet the sum of $2,450,000 ... within 10 business days of the execution date of this Agreement by MetroNet."). Second, the purported agreement required execution by both parties as attestation of their voluntary and informed consent. ("The parties agree, represent and warrant as follows.... They voluntarily execute this Agreement, after consulting with counsel and without being pressured or influenced by any statement or representation of any person acting on behalf of any other party, ***1015** including any other party's officers, directors, employees, agents and attorneys."). Third, the final paragraph of the agreement provides for the method of signing and for the legal effect of signed counterparts. ("This Agreement may be signed in multiple counterparts which may be transmitted via facsimile, with the same effect as if all parties had signed the same agreement. All counterparts shall be construed as and shall constitute one and the same agreement. In proving this Agreement, it will not be necessary to produce or account for the original counterpart signed by the party against whom the proof is being presented.").

More importantly, Qwest manifested its unwillingness to be bound on October 6, 2000, when Qwest failed to sign the agreement as had been expected. As the district court

pointed out, "[t]hat act should have put MetroNet on notice that all was not well with the agreement and that perhaps the parties had not reached a full and final resolution of their differences." Qwest's attorney informed MetroNet's counsel on October 6 that she was having difficulty obtaining the signatures necessary to finalize the agreement. This, too, put MetroNet on notice that no final deal had been struck. Furthermore, MetroNet's repeated efforts to obtain Qwest's signature even after October 6, 2000, contradict MetroNet's position that the settlement agreement was intended to be legally operative prior to signing.

CONCLUSION

For the reasons stated, we affirm the district court's denial of MetroNet's motion to enforce its purported settlement agreement with Qwest, reverse the district court's grant of summary judgment on MetroNet's monopolization[31] and essential facilities claims and remand for further proceedings. Each party shall bear its own costs.

AFFIRMED in part, REVERSED in part and REMANDED.

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[31] Except as to the district court's grant of summary judgment adverse to MetroNet on its claim of attempted monopolization, as discussed in notes 1 and 16, *supra*.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

METRONET SERVICES CORPORATION and METRONET TELEMANAGEMENT CORPORATION,	CASE No. C00-0013C
	ORDER
Plaintiff,	[STAMP: FILED APR 16 2001]
v.	
QWEST CORPORATION,	
Defendant.	

This matter comes before the Court on defendant's motion for summary judgment (Dkt. No. 47). The Court, having considered the briefs submitted by the parties and determined that oral argument is not necessary, hereby finds and rules as follows.[1]

I. Background

This is an antitrust case between Qwest, a large telecommunications company that, among other business interests, owns the telecommunications infrastructure in many western states, including Washington, and Metronet, a reseller of business phone service.

This dispute concerns the manner in which Qwest prices a telecommunications product called Centrex. Centrex is a

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[1] Plaintiffs motion for leave to file a memo in support of its motion to file an overlength brief (Dkt. No. 65) is GRANTED.

business phone service that consists of two components: multiple telephone line access to Qwest's physical telephone network (the access component), and calling features, such as caller ID, intercom calling, and long distance service (the features component). Qwest offers a volume discount on the access component of Centrex. The Centrex customer need not purchase each telephone line individually at Qwest's flat rate for business service (the 1FB rate); rather, the Centrex customer gets all the lines it needs at a substantial discount from the 1FB rate. The price of Centrex is competitive with the price of purchasing a PBX and a 1FB line. Smaller businesses, those with 20 lines or fewer, do not qualify for the volume discount reflected in the Centrex rate, and generally cannot justify the expense of a PBX system. Qwest expects small businesses simply to purchase the number of 1FB lines they require, and purchase the calling features they require on the open market.

Metronet's business consists mainly of purchasing Centrex services from Qwest and reselling those services to aggregations of smaller businesses. Because of this discount, there was a substantial difference between the cost at which Metronet could provide Centrex service to an aggregation of small businesses and the price at which a small business could purchase multiple 1FB lines. By pricing Centrex above the cost Metronet incurred in providing the service to the small businesses but below the price at which the small businesses could purchase multiple 1FB lines, Metronet was able to reap handsome profits.

Qwest charges separate fees for the access component and the features component of Centrex, but it requires consumers who purchase one component also to purchase the other component. Initially, the price Qwest charged Metronet for the features component had been calculated based on the number of Centrex packages Metronet purchased from Qwest without regard for the number of individual phone lines to separate locations covered by the Centrex package. In 1997, Qwest instituted a change in their pricing policy re-

garding the features component of Centrex; the new price is calculated based on both the number of Centrex packages and the number of individual phone lines to separate locations. Qwest refers to this pricing policy as "per location pricing" of Centrex. Because of the change in pricing policy, Metronet must pay significantly more for the Centrex services that it then resells to the aggregated smaller businesses. According to Metronet, Qwest's institution of per location pricing prevents Metronet from pursuing its reselling business profitably.

At roughly the same time that Qwest instituted its per location pricing policy, the local telephone market was opened to competition pursuant to the Telecommunications Act of 1996 ("The Telecom Act"), 47 U.S.C. § 202 et seq. As a result, Qwest significantly reduced the price of its IFB line, and hence also reduced the price of the access component of Centrex. Metronet now purchases the two components of Centrex at a total price much lower than the price it paid before the Telecom Act went into effect. Because of the per location pricing policy, however, Metronet pays more (and proportionately more) for the features component due to the multiple locations of its aggregated businesses. In fact, Metronet now pays a price for the features component that is much closer to the going rate in the competitive market for calling features. Therefore, the price at which Metronet provides calling features to its customers is now much closer to the price at which those customers could purchase calling features on the open market. And, because of the reduction in the price of 1FB lines, the price Metronet charges its customers for the access component is now much closer to the price at which those customers could purchase 1FB lines from Qwest. Thus, the total price that Metronet charges its customers for Centrex services is now much closer to the price those customers would pay by purchasing 1FB lines and calling features independently. The effect of the reduction in price for 1FB lines and the per location pricing policy has been to reduce, if not eliminate, Metronet's profit margin.

Metronet contends that Qwest's per location pricing of its Centrex product violates federal antitrust laws. Metronet brings three causes of action. First, Metronet claims that Qwest has denied Metronet access to an essential facility in violation of § 2 of the Sherman Act 15 U.S.C. § 2. Second, Metronet claims that Qwest has illegally maintained a monopoly of local business phone service, also in violation of § 2 of the Sherman Act. Third, Metronet claims that Qwest has illegally attempted to monopolize local business phone service in violation of § 2 of the Sherman Act.

II. Summary Judgment Standard

Summary judgment is appropriate where there are no issues of material fact and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Supreme Court has rejected the contention that antitrust plaintiffs "can get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial" to support the allegations. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

"Summary judgment is particularly important in antitrust cases because of the fearful dimensions such cases can assume and because of the powerful incentives to offer claims or defenses of little merit." Areeda and Hovenkamp, Antitrust Law, § 322 (1995). The Supreme Court has made clear that the limitations on the use of summary judgment in antitrust cases, if any, attach to claims where motive and intent play a crucial role. *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962). The theory is that these issues turn on evidence that is peculiarly within the possession of the defendant, and so should not be dismissed summarily. *See* Areeda and Hovenkamp, Antitrust Law, § 322c (1995). Where, as in this case, the issues do not turn on such evidence, there is no proscription on the use of summary judgment.

III. Essential Facilities Claim

It is well-settled law in the Ninth Circuit that to establish an essential facilities claim the plaintiff must prove four elements:

(1) Defendant is a monopolist in control of an essential facility;

(2) Competitors of the monopolist are unable to duplicate the facility;

(3) The monopolist has refused to provide the competitors access to the facility, and

(4) It is feasible for the monopolist to provide access to the facility.

Ferguson v. Greater Pocatello Chamber of Commerce. Inc., 848 F.2d 976, 983 (9th Cir. 1988); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 n.9 (9th Cir. 1991). Qwest claims, and the Court agrees, that Metronet cannot prove elements (1) and (3).

The parties are somewhat unclear about what they consider to be the essential facility in this case. The Court finds that it is unlikely that a precise definition is required to decide the issues before this Court.

Under element (1), Qwest controls an essential facility only if it is able to eliminate competition in the downstream market. *Alaska Airlines,* 948 F.2d at 544. The parties agree that the downstream market is, "The retail provision of wireline switched local exchange and exchange access services to small business customers in the Seattle/Tacoma area." Metronet's Memorandum in Opposition to US West's Motion for Summary Judgment, p. 3, n.3; Qwest's Memorandum in Support of its Motion for Summary Judgment, p. 14, n.18. In short, the relevant market is the retail phone service for small businesses in the Seattle/Tacoma area.[2]

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[2] Metronet is exclusively a reseller of Centrex services, so it actually competes in only a subsection of the market for local business phone

Qwest is not capable of eliminating competition in the market for local business telephone service. The Telecom Act itself requires Qwest to open up access to at least part of its essential facility, its physical network, to firms with their own switching facilities wishing to interconnect with that network. 47 U.S.C. § 251(d)(2). These firms are then able to provide their own features and compete with Qwest in the market for local business phone service. The Telecom Act also requires Qwest to provide access to its calling features. 47 U.S.C. § 153(29). Metronet asserts, however, that Qwest could make access to its calling features financially unrewarding by adopting exclusionary pricing policies such as per location pricing. In a market as broadly defined as local business phone service, however, this point carries little force. Even if the per location pricing policy makes the calling features available to Metronet and other firms on terms that make resale of those features unprofitable, there will still be competition in the market for local business phone service from wholesalers and from firms with their own facilities who have interconnected with Qwest's physical network under the Telecom Act. Therefore, Qwest does not control its essential facilities because it cannot eliminate competition in the relevant market.

Under element (3), Qwest would deny Metronet access to its essential facility if it simply refuses Metronet any access to its facility, or prices access to that facility in a way

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service. Nevertheless, it would be inappropriate to define the relevant market more narrowly for the purposes of Metronet's essential facilities claim because an essential facilities claim requires the plaintiff to prove that there is a relevant market in which the plaintiff and defendant compete. *See, e.g., Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1357 (Fed. Cir. 1999)("[T]here must be a market in which plaintiff and defendant compete, such that a monopolist extends its monopoly to the downstream market by refusing access to the facility it controls"). Qwest does not compete in the reselling niche of the larger local business telephone service market. Therefore, limiting the relevant market to reselling would be inappropriate in the context of an essential facilities claim.

that would "drive [Metronet] away." *Alaska Airlines*, 948 F.2d at 545. It is clear that Qwest has not denied Metronet all access to its essential facility because Metronet continues to this day in its business of reselling Centrex. The issue, therefore, is whether Qwest's per location pricing policy has denied Metronet access to Centrex by "driving [Metronet] away."

Qwest will be driving Metronet away if its pricing policy makes it unprofitable for Metronet to continue reselling Centrex and there is no other plausible alternative way in which Metronet can access Centrex and resell the service at a profit. It is unclear from the record whether Metronet remains profitable. Metronet's CEO asserted under oath that the firm is no longer profitable. Declaration of Kenneth Seeley § 4. Metronet's accounting controller, however, stated under oath that the firm remained profitable through 2000. Deposition of Shane Kordosis, 106:2-6, 115:2-4, 117:2-16, 120:8-121:5.

If Metronet does indeed remain profitable, then it cannot rightly claim to have been denied access to Centrex. Resolving this confusion in favor of Metronet by supposing that it is no longer profitable, however, does not help Metronet because Metronet has not shown that any unprofitability was caused solely by Qwest's pricing policy. Qwest has supplied substantial evidence that Metronet's unprofitability, if any, can be explained by numerous factors other than Qwest's pricing policy.[3] Qwest points to (1) the large reduction in the

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[3] Qwest also argues that Metronet is not entitled to access to Centrex on terms that guarantee Metronet's profitability, and should not be permitted to proceed to trial simply by alleging that the terms on which they are granted access to Centrex make it unprofitable for them to pursue their reselling business. *Sand & Gravel, Inc. v. CSX Transport., Inc.*, 924 F.2d 539, 545 (4th Cir. 1991) (granting summary judgment on an essential facilities claim even though the rate charged for access made it unprofitable for the plaintiff "the reasonable standard of access factor can not [sic] be read to mean the assurance of a profit for [the plaintiff]"). This argument is unavailing for two reasons: First, no firm can be guaranteed a profit by the terms on which they are granted access to an essential

rate of IFB lines, (2) the increase in competition in the market for local business phone service, (3) the fact that Metronet several times lost management and sales personnel who were not replaced immediately, and (4) the fact that Metronet failed actively to seek new sales of Centrex. *See* Qwest's Memo in Support at 4-5, and supporting documents. Separately and in concert, these claims provide alternative explanations for Metronet's assumed financial difficulties. By producing evidence in support of these claims, Qwest has produced evidence that calls into question Metronet's assertion that Qwest's per location pricing policy has caused its unprofitability. Faced with this evidence, Metronet's burden on summary judgment requires it to respond with evidence that would permit a rational trier of fact to find that the per location pricing policy, without these other factors, would be sufficient to cause Metronet to be unprofitable. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). And given that Qwest has produced this evidence, mere dispute or disbelief on the part of Metronet is not enough to carry its burden on summary judgment.

Metronet responds inadequately to the evidence produced by Qwest showing other potential causes of Metronet's assumed unprofitability. Metronet states that whether it is profitable and whether organizational changes within Met-

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facility because there are myriad potential causes of unprofitability for which the terms of access could not compensate. The force of the Fourth Circuit's statement for this case, then is not that Qwest may price with impunity no matter what effect its pricing policy has on its competitors in the downstream market Rather, the statement merely means, in this context, that Qwest cannot be expected to compensate with its pricing policy for other factors that may cause Metronet to be unprofitable. Second, Qwest is well-aware that the Ninth Circuit would find a denial of access where the defendant's tears of access to an essential facility would "drive [defendant's] competitors away." *See* Qwest's Memo in Support at 12. If the per location pricing policy by itself caused Metronet to be unprofitable, and Metronet can prove this, then Qwest might be driving Metronet away, and therefore denying access under Ninth Circuit interpretation of the denial of access prong of the essential facilities doctrine.

ronet might have caused any unprofitability are irrelevant to the issues before the Court. Under Ninth Circuit law, the Court finds both issues highly relevant The issue of Metronet's profitability is relevant because if it is profitable for Metronet to continue as a reseller of Centrex, Metronet has not been denied access to an essential facility. The issue of whether Metronet's organizational changes have caused Metronet to be unprofitable is relevant because unless Metronet can produce at least some evidence that Qwest's per location pricing policy has caused its unprofitability without any of the other potential causal factors cited by Qwest, Metronet has not shown that it has been denied access to an essential facility. Thus, Metronet's unilateral declaration that the issues of its unprofitability and potential causes of its unprofitability are irrelevant is inadequate. Moreover, Metronet does not dispute Qwest's evidence that competition in the relevant market has increased. Therefore, Metronet has not met its burden of showing the existence of a genuine issue of material fact whether Qwest's per location pricing policy has denied Metronet access to an essential facility.

Metronet is also unable to show that there are no reasonable alternative means of access to Qwest's essential facility. Qwest currently sells 1FB Lines and certain calling features wholesale, which allows other firms to purchase these services and resell them at the retail level for profit. Metronet, in fact, has entered into an agreement with Qwest to purchase such services wholesale. Metronet claims that Qwest has refused to make certain calling features available at the wholesale level (e.g., voicemail and long-distance), but Metronet does not rebut Qwest's evidence that those features can be purchased elsewhere at competitive prices on the open market. Therefore, as far as Metronet has shown, there are reasonable alternative means of access to Qwest's essential facility.

Metronet has not shown that its unprofitability, if any, is caused by Qwest's pricing policy. Nor has Metronet shown that alternative means of access to Qwest's essential facility

are unavailable. Therefore, Metronet has not come forward with evidence sufficient to show that it can establish that Qwest has denied Metronet access to an essential facility. Qwest's motion for summary judgment on this claim, is therefore GRANTED.

IV. Illegal Monopolization

To prove an illegal monopolization claim under the Sherman Act § 2, the plaintiff must establish three elements:

(1) The defendant possesses monopoly power in the relevant market;

(2) The defendant willfully acquired or maintained its monopoly power through exclusionary conduct; and

(3) The defendant caused antitrust injury.

American Prof'l Testing Serv., Inc. v Harcourt Brace Jovanovich Legal & Prof'l Publ'ns., Inc., 108 F.3d 1147, 1151 (9th Cir. 1997). If Qwest is able to show that Metronet cannot establish any one of these elements, summary judgment on the monopolization count must be granted. In fact, Qwest has shown that Metronet can establish none of these elements.

The Ninth Circuit has been very clear about the test to establish element (1): "[M]onopoly power is the power to exclude competition or control prices." *United States v. Svufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990). This test is disjunctive, and is not satisfied in this case.

While it is clear that Qwest has a monopoly share of the relevant market (it has more than a 95% share of the local retail business phone service market), it is highly unlikely that Qwest's high market share confers upon it monopoly power (the power to exclude competition or control prices). Qwest has presented undisputed evidence that, since the Telecom Act became effective, there are, or have recently been, as many as 17 competitors in the local retail business phone service market. *See* Bogus Deposition, 78:2-23, Tatman Deposition, 60:2-17, Beckett Deposition, 35:8-36:1,

91:17-92:5. While Metronet correctly points out that no other competitor in this market has more than a 1.1% share of the market, that is easily explained by the fact that the market has been open to competition for less than 5 years. Given that Qwest had a 100% share of the market at that point, it would be surprising if their market share diminished more quickly than it has because some barriers to entry remain in local telecommunications markets. Metronet's expert overstates the case for high entry barriers in this market, see Metronet's Memo in Support at 21-22 and supporting documents, yet some barriers do remain. For example, Qwest has strong brand name identification, which tends to breed consumer loyalty. Also, certain types of new entrants (those wishing to maintain their own switching facilities and merely interconnect physically with Qwest's network) must absorb substantial start-up costs that Qwest has already incurred. These barriers will diminish in time as new firms build their infrastructure, gain a toehold in the market, advertise more widely, and gain wider recognition. Thus, the current distribution of market share is unlikely to be stable; a 95% market share now could well evaporate in the coming years without antitrust involvement. Therefore, it is unlikely that Qwest can exclude competition.

Qwest is also unable to control prices in the local business phone service market. First, phone service is not the type of commodity that is susceptible to price increase through output reduction.[4] Second, the fact of competition in the wake of the Telecom Act prevents Qwest from unilater-

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[4] According to standard price theory, prices increase as output decreases and demand rises. *See* Hovenkamp, *Antitrust Law and Policy*, § 1.1. Thus, monopolists in markets to which price theory applies can increase prices in the market by reducing output and driving up demand. Oil companies, for example, can increase demand, and hence price, by making less oil available. Phone service, however, is not a commodity susceptible to output limitation in the way that oil is. Thus, Qwest cannot control the prices for the service it provides in way that oil companies can control the prices for the product they provide.

ally raising prices. Third, while Qwest can control the price it charges for access to phone service to some degree, the Washington Utilities and Transportation Commission (WUTC) mitigates the extent to which Qwest can simply dictate prices for access to phone service. Metronet points out that Qwest can determine its price for calling features because the WUTC does not control that aspect of Qwest's service. Qwest notes correctly, however, that calling features are not regulated by the WUTC because that market is open to competition. Thus, the WUTC limits Qwest's ability to control access prices, and the competitive market for calling features limits Qwest's ability to control prices for calling features. For the foregoing reasons, then, Qwest is unable to control prices in the local business phone service market

To prove exclusionary conduct under element (2), Metronet must show not merely that Qwest's per location pricing policy has harmed competitors (e.g., Metronet), but that the policy constitutes a harm to competition. *Oahu Gas Serv., Inc. v. Pacific Res., Inc.*, 838 F.2d 360, 370 (9th Cir. 1988). The test for harm to competition is whether consumer welfare has been harmed. *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995). Consumer welfare, in turn, has been harmed if there has been a decrease in allocative efficiency and an increase in the price of goods beyond competitive levels. *Id.* "Allocative efficiency" requires that society's resources be allocated efficiently. Hovenkamp, *Antitrust Law and Policy*, § 2.3 (1994).

The test for element (2) is conjunctive: whether consumer welfare is harmed depends on both a decease of allocative efficiency and an increase in price. Qwest produced unrebutted evidence that the overall cost of Centrex to consumers dropped significantly when the local phone markets were opened up to competition under the Telecom Act. The fact that competition in the local business phone service market can keep the price of Centrex overall below the pre-price-change level is sufficient to constitute no harm to consumer welfare. And without harm to consumer welfare, Qwest can-

not be found to have engaged in exclusionary conduct. And without exclusionary conduct, element (2) in a monopolization claim is not satisfied.

To establish an antitrust injury under element (3), the plaintiff must show that it has suffered an "injury of the type the antitrust laws were intended to prevent" and that the injury "flows from that which makes the defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 334 (1990). The question of antitrust injury is separate from the question of injury-in-fact and causation of that injury by Qwest's conduct. See Hovenkamp, Antitrust Law and Policy, § 16.3c. Metronet may have suffered an injury, and that injury may indeed have been caused by Qwest, but it is not an antitrust injury unless the injury is caused by conduct by Qwest that is illegal under the antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697 (1977).

Because Metronet has not shown that Qwest's actions satisfy the test for monopolization, they cannot show that any injury Metronet has suffered is an antitrust injury and summary judgment on the monopolization claim is therefore GRANTED.

V. Attempted Monopolization

To prove an attempted monopolization claim under the Sherman Act § 2, the plaintiff must establish three elements:

(1) The defendant has a specific intent to monopolize a relevant market;

(2) The defendant has engaged in predatory or anticompetitive conduct; and

(3) The defendant has a dangerous probability of success.

Alaska Airlines, Inc., v. United Airlines, Inc., 948 F.2d 536, 542 (9th Cir. 1991).

Qwest suggests that the evidence brought to support its motion for summary judgment on the monopolization charge

is sufficient to support its motion for summary judgment on the attempt charge as well. Indeed, some courts and scholars have wondered whether there is an attempt offense that is not simply identical to the monopolization offense. *See* P. Areeda and D. Turner, *Antitrust Law*, § 820 (1994). To the extent that there is, it consists in elements (1) and (3) listed above.

Qwest, for its part, simply declares that Metronet can prove none of the three elements. But Qwest produces no evidence at all regarding elements (1) and (3). Qwest does suggest, albeit somewhat obliquely, that the evidence and arguments brought forth in response to the monopolization charge are sufficient to establish that Metronet cannot prove element (2). Because the test is conjunctive, Qwest need only show that Metronet cannot prove element (2).

Qwest is correct that the attempt offense has as an essential element an anticompetitive conduct requirement that is essentially no different from the monopolization offense's exclusionary conduct requirement. Thus, that Qwest has produced evidence tending to show that Metronet cannot prove exclusionary conduct means that it has produced evidence tending to show that Metronet cannot prove anticompetitive conduct. Metronet has not produced evidence sufficient to allow a rational fact finder to find that Qwest has engaged in anticompetitive conduct. Thus, Metronet has not come forward with evidence sufficient to establish element (2). Qwest's motion for summary judgment on the attempted monopolization claim is therefore GRANTED.

VI. Summary

Where, as here, the issues in an antitrust case do not turn on evidence of motive and intent that is peculiarly within the hands of the defendant, there is no proscription on the use of summary judgment peculiar to antitrust cases. Because Metronet cannot prove each element of the causes of action alleged, Qwest's motion for summary judgment is hereby

GRANTED in its entirety. The clerk is directed to enter judgment in favor of Qwest.

SO ORDERED this 16th day of April, 2000.

/s/
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

STATUTORY PROVISIONS

15 U.S.C. § 2

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

47 U.S.C. § 251

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates,

terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and

the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange

carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to

such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C. § 252

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for

network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration

thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an

agreement approved under this section to which it is a party *to any other r*equesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

Pub. L. No. 104-104, § 601

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SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

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(b) ANTITRUST LAWS.--

(1) SAVINGS CLAUSE.--Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

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